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No. 80-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE, Warden,
Petitioner,

v.

NOAH H. LUNDY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

GENERAL DOCKET
UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DATE	FILINGS—PROCEEDINGS
1979	
5/24	Certified Record (1 vol. pleadings, 1 envelope pleadings), filed; and cause docketed

7/2	See Order of 3/18
7/13	Brief (7) of appellee (m-7-12) (pro se)
1980	
2/5	Order appointing counsel
2/7	Motion: appellants' to include state trial transcript in appendix (m-2/6)
2/12	Motion: appellee to strike brief and appendix of appellants (m-2/8)
2/12	Appearance of D. Smith for appellee
2/12	Appearance of J. Zimmermann for the appellant
3/18	Order granting the appellee's motion to strike the brief and appendix filed by the appellants; appellants to file new brief and appendix by April 18, 1980; further, order denying appellants' motion to include a state trial transcript in the appendix
3/6	Brief and appendix (7) of appellee (m-3/5)
3/17	Reply brief (8) of appellant
4/16	Appendix (8) of appellant (m-4/15)
4/17	Motion: appellant's brief to 66 pages (Granted 4/21/80 JPH)
4/21	Brief (8) of the appellant (m-4/15)
6/12	Additional citations submitted by appellant (m-6/10)
6/16	Cause argued by J. Zimmerman for the appellant, by D. Smith for the appellee and the case submitted to the Court (Before: Celebrezze, Engel and Martin, JJ.)

6/27	Judgment of the District Court affirmed on order without opinion (Celebrezze, Engel and Martin, JJ.)
7/11	Motion: appellants to file state trial transcript (m-7/9)
7/25	Order denying the appellant's petition to file the trial transcript (Engel, J.)
7/25	Petition for rehearing en banc (m-7/9)
9/04	Order denying petition for rehearing (Celebrezze, Engel and Martin, JJ.)
9/12	Mandate issued (no costs taxed)
11/17	Motion: appellant to recall mandate (m-11/14) (Motion granted-Engel, J.)
12/1	Notice of filing petition for certiorari 11/25/80 (Sup.Ct.No. 80-846)
12/03	Order granting motion of appellant to recall the mandate
12/03	Certified copy of above order issued to District Court
1981	
1/5	Motion: respondent for stay of mandate (m-1/2/81) (Granted, Engel, 1/6)

GENERAL DOCKET
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

DATE	PROCEEDINGS
2/15/79	ENTERED Ordered that Clerk will file attached petition for habeas corpus in forma pauperis and issue process. The State shall show cause within 20 days why a writ of habeas corpus should not issue and shall file a transcript of the proceedings in the trial court. Cy of this Order to USM for service on Vinson Thompson along with summons and cy of petition.
2/15/79	FILED: Petition for habeas corpus under 28 U.S.C. Section 2254. Cy of petition, summons and USM 285, and Order to USM for service.
3/12/79	Filed: Motion for Summary judgment, in behalf of defendant.
3/12/79	Filed: Answer. The respondents respectfully submit that the petition for Writ of Habeas Corpus should be denied and the case dismissed.
3/21/79	Entered: Order in re motion for summary judgment: Denied. Case Notice No. 2.
3/21/79	Entered: Memorandum of the Court . . . Under the charge as given, the limitation of cross examination of the victim, and the flagrant prosecutoial misconduct this court is compelled to find that petitioner did not receive a fair trial. Therefore the writ shall be granted and defendant discharged from custody unless within ninety days the State of Tennessee initiates steps to grant defendant a new trial.

3/21/79 Entered: Order of the court . . . a writ of Habeas Corpus shall be granted and the defendant discharged from custody unless within ninety days the State of Tennessee initiates steps to try defendant anew.

4/12/79 Filed: Notice of Change of Parties. C/S

4/12/79 Filed: Notice of Appeal. C/S

4/17/79 Entered: Order in re motion for Stay pending appeal: Granted. Case Notice NO. 3

RELEVANT PORTIONS OF STATE TRIAL TRANSCRIPT

Testimony Of Miss Sharon Murphy

* * * * * * *

[42]* A Sir?

Q. This is one of the boys the Attorney General referred to that you had had intercourse with previously? A. Yes.

Q. So this wasn't a year before this happened, it was all the way up to two weeks before it happened, is that correct?

Gen. Evans: Your Honor, that makes it within a year before it happened. I was covering two incidents. And I think two weeks before is within the year before, I would assume.

The Court: Very well. The members of the jury will do their own recollection of what the witness testified to previously. Mr. Workman, with respect to the Attorney General's objection, it is good, and I sustain it.

Q. Mr. Workman: I don't understand.

The Court: I sustained to his objection.

Mr. Workman: To my previous question?

The Court: Yes. Your determination of what she had said earlier.

Q. So you had had intercourse with boys during 1973, is that true or not true? A. Just Aaron Miller.

Q. And you had intercourse with Danny Nipper, [43] a boy by the name of Danny Nipper, had you not? A. Not in the year '73. That was the year before in '72.

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*Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

Q. I believe you had intercourse with Aaron Miller ten to twenty times during this period, had you not? A. I don't remember how many times.

Q. That's what you told me previously. A. I don't remember.

Gen. Evans: Object to what he told her previously.

The Court: Very well. I sustain the objection. You may ask her questions, Mr. Workman, but, ladies and gentlemen of the jury, you will not consider for any purpose the comment of counsel. The duty of counsel is to ask the questions and let the witness answer them. All right.

Q. Miss Murphy, did you or did you not tell me on an occasion when I talked with you that you had had intercourse with Aaron Miller ten to twenty times? A. I don't remember.

Gen. Evans: Your Honor, I want to object to that, because I consider the conversation he had with her—this young lady—completely improper. He didn't inform her who he was....

Mr. Workman: What?

[44] Gen. Evans: ...he didn't inform her who he was, he didn't tell her she had a right to have counsel present, he didn't do anything. He got her down there....

Mr. Workman: (Inaudible)

Gen. Evans: She's telling the truth on the stand—and he got her down there, and now he's trying to make use of that conversation, which was completely improper, and I object to any reference to that conversation or any attempt to use it to impeach on cross-examination.

Mr. Workman: If I may, Your Honor, I don't like the inference that counsel got her down there and tried to twist her arm. As the Court knows, counsel in all cases try to contact the

witnesses and find out what they know, and that's what I did in this case. It happens in 99 percent of the cases in this court.

Gen. Evans: In most cases, Your Honor, that I'm familiar with, I believe the proper thing to do is that counsel inform the people they're talking to the people who they represent, which did not happen in this incident. This young lady did not know who she was talking to at the time she was talking to him.

[45] Mr. Workman: During the course of my talking to her, I got a phone call from another....

The Court: Excuse me, excuse me, gentlemen. Would counsel approach the bench here a moment. THEREUPON, A CONFERENCE WAS HELD AT THE BENCH OUT OF HEARING OF THE JURY. THE JURY WAS EXCUSED FROM THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD:

The Court: Very well. In the absence of the jury here, General, you may state the basis of your objection to the question asked.

Gen. Evans: Your Honor, this has happened in too many cases recently, and it's crucial in this case. This is a nineteen year old girl, and she told me the same thing that Dale was telling you up at the bench. She gets a call from a guy who says I'm a lawyer and I'm involved in the Lundy case. Now, here's a girl that's never been to court before or anything. Her only connection so far with this case was that she went to the grand jury on it. She gets a call from somebody who says I'm Dale Workman, and I'm an attorney, and I'm involved in the Lundy case, and I want to talk to you. She says, well, sure, I'll come down to your office and talk to you. The very same thing she said to me when I called her. Of course, I identified myself.

[46] Mr. Workman: And I did identify myself.

Gen. Evans: I said I was the District Attorney General, and I represent the people of the State of Tennessee. I laid the whole thing out for her. Now, he didn't. He said he was involved in the Lundy case. Well, I'm involved in the Lundy case. Then he gets her down there, and now he wants to impeach her on anything she said at that conference. She was never advised of any rights. And I know what he says. Oh, she doesn't have any rights. Well, I think she does, and I'm sick and tired—I'm going to say this in front of the jury if it gets in—I'm sick and tired of everybody in the United States having rights but the victims in these criminal cases. And she's got just as much right as anybody else. She has a right to be represented by counsel, she has a right for one of us to be there when she's talking to anybody involved in this case, and he knows it.

Mr. Workman: Citation of authority, General.

Gen. Evans: And he should tell her that.

Mr. Workman: Citation of authority, General.

Gen. Evans: She has a right to be represented.

Mr. Workman: Cite the authority for the [47] Court.

Gen. Evans: Well, she's my client. If he can't....

Mr. Workman: (Inaudible)

Gen. Evans: ...I'm sorry if he doesn't understand legal ethics. I'm sorry.

Mr. Workman: Cite what legal ethics, General.

Gen. Evans: Saying that you're not suppose to talk to another lawyer's client without that lawyer being present. Now, if he hasn't seen that in the ethics, then forget it. Now, I'm tired of it happening. And in this case, they're going to try to make a big thing out of it, so I'm raising the roof. Now, if Your Honor decides it is admissible, and they can cross-examine on this, then

we're going to have a whole new collateral issue, because I'm not going to stop with just trying to get her to explain her answers. I'm going to have her explain what happened, and how she wasn't advised of her rights, and how he tape recorded all this without telling her that was going on....

Mr. Workman: Who said I tape recorded her?

Gen. Evans: You told me you tape recorded her.

[48] Mr. Workman: No, I didn't, General. I said (Inaudible).

Gen. Evans: Okay. But that's my objection.

The Court: All right. All right, Mr. Workman, I'll hear you.

Mr. Workman: Your Honor, first of all, the General talked fifteen minutes in front of the jury, fifteen minutes in front of Your Honor about all these rights, but I haven't seen one citation of authority. What's wrong? If she's telling the truth, she's—if she told the truth then, she'll tell the truth now. Is he scared she won't tell the truth now? As I've tried to advise the Court, now everything up until the point we got is what happened. During this interview with this young lady, I got a phone call from Roxie Nelson's son after I talked to Roxie Nelson. And I told him over the phone—and he asked who do you represent, and I told him over the phone with her sitting in my office that I represent Noah Lundy. She said do you represent Mr. Lundy, and I said yes, and we went on with our interview and finished it. We were about half through when that was told to her definitely. And I don't know what he's screaming about. First of all, a witness in a criminal case is not the client [49] of the State. Second of all, there's no authority for all this....

Gen. Evans: (Inaudible)

Mr. Workman: The General is afraid the truth is going to be heard, and he don't want it to be heard....

Gen. Gill: We want the truth from her, not from something that he's put in her mouth. There was nobody with any legal education there to advise her about the questions he was asking her, about what they might mean. An experienced counsel can put words in anybody's mouth, and he knows it, and that's the reason that you have the rule of evidence....

Mr. Workman: (Inaudible)

Gen. Gill: (Inaudible) the right to have counsel present when anything like this happens.

The Court: Mr. Workman, did I understand you to say that in the initial part of your conversation you—on the front end of your conversation, you identified yourself?

Mr. Workman: I—the first time I talked to her on the phone I told her my name, that I was an attorney, I was involved in the Noah Lundy case, I would like to talk with you about it.

The Court: Did you tell her that you [50] represented Mr. Lundy?

Mr. Workman: Not at that time. No, I didn't say I did and I didn't say I didn't. I said I was involved in the case. If I send my law clerk out, Your Honor, or send a friend that's no lawyer and ask her what the facts are, what's the difference? During the conversation, Mr.—I forget Mrs. Roxie Nelson's son's name, but he called me on the phone, and she overhears me tell him that, and I tell her—she said do you represent Mr. Lundy, and I told her during the middle of the conversation.

The Witness: Can I say something?

Gen. Evans: Sure.

The Witness: That was after we finished. We had finished talking, then you got the phone call, and that's when you told me. You didn't tell me before, and I'm not lying either. And then after that, after you told me that, you said, well, after all

this is all over, wonder if you'll come back up here and see me sometime. That was his exact words. And I said, no, sir, I doubt it.

The Court: All right.

Gen. Evans: Your Honor, I've not changed my position. I think it's inadmissible and inexcusable to use that conversation to cross-examine.

Mr. Workman: If it is unethical, Your Honor, [51] then the Bar Association....

Gen. Evans: Well, I'm trying criminal cases and I consider Dale Workman a friend of mine, and I'm not going to file complaints against him with the Bar Association. I figure I can take care of my house right here in Criminal Court. I don't need to go out and try to get the Bar Association to do anything about it, because they won't do anything anyway. But I can take care of myself in Criminal Court. He knows and Your Honor knows why you got to tell them who you are, and he, also, knows why its important if we want somebody else or she wants somebody else to be there, for somebody else to be there, because we now have only two participants in that conversation, this young lady and an experienced trial attorney. I can just imagine how the questions went, the one thing he's gotten into so far about how many times did you have intercourse with Aaron Miller. I don't know. Well, ten times, twenty times. Yeah, well, more or less I guess. So now he's saying, well, didn't you tell me ten to twenty times. That girl never had any experience in any Criminal Court before or any kind of court before, and he can lead them down the primrose path. You take that guy over there, and he's had plenty of experience. You give me an hour alone [52] with him, and I'd have him admitting to wanting to assassinate Nixon. But that's why it's not cricket. And I say she's got just as many rights as he does.

The Court: Very well, gentlemen, the Court is not passing on the question of ethics, it is passing on the question of admissibility of evidence, particularly on an objection that has been raised to the question put to this witness whether she did or did not tell him a certain thing during a certain conversation. It appearing to the Court that the attorney did not identify himself as to the fact that he was representing the defendant in this case, he did not make this identification to this witness prior to putting these questions to her, that is, did not make his representation known to her prior to the time of presenting these questions to her, the Court then sustains the objection. However, counsel will be allowed to ask her other questions. I'm not cutting you off, Mr. Workman. You may ask her other questions....

Mr. Workman: What if I asked her something she told me about?

The Court: This is during that conversation, sir. Since you did not identify yourself as the attorney for Mr. Lundy, you will not ask her about [53] what she may have told you in that. Now, you may ask her questions about such other—such information as you have. In other words, don't refer to the conversation, but you may ask her about her prior relationship with these other individuals. I'm not cutting you off....

Mr. Workman: For my own direction, Your Honor, what is the authority for such? In other words....

The Court: The Court has just ruled....

Mr. Workman: For my own direction, Your Honor, what—is there a case on that?

The Court: There is now.

Gen. Gill: Of course, Your Honor, our objection is on the basis that due to the nature of this conversation, whatever she said and how the questions were asked and so forth, it wouldn't

be reliable to use for this purpose because of the situation. I think that's a reason for this duty to advise the people of this right.

Mr. Workman: In light of what the Attorney General said earlier, is the Court going to let the Attorney General argue to the jury that it is improper for the defense counsel to ask the prosecution witness questions without having an attorney general [54] present to advise her on some rights, which I'm not clear on what those....

Gen. Evans: No, no, I said if this got in, the ball game was not going to quit right here, that I was going to go into the whole shooting match. But if it doesn't get in, and the Judge rules it not admissible, as far as I'm concerned, the issue is concluded right now and should never be mentioned again. I won't mention it if it's not mentioned again. I guarantee you I'll mention it if it's mentioned again.

The Court: As to what the Court will rule or will not rule on in the future or as to how it will rule rather will depend upon the evidence as it presents itself at that time. All right. Bring back the jury, please.

THEREUPON, THE JURY RETURNED TO THE COURTROOM, AND AFTER THE CALL OF THE JURY WAS WAIVED BY BOTH PARTIES, THE FURTHER FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

The Court: All right. You may continue

Cross-Examination (Cont'd)

By Mr. Workman:

Q. Miss Murphy, have you discussed this case with the Attorney General? A. Yes, sir.

[55] Q. Did you discuss the facts and situation with the police officers? A. The detectives, yes.

Q. Did you give them a statement? A. Yes.

Q. Now, on this occasion, you went to the Family Pantry or what market was it? A. It's the Family Pantry now. Then it was Carl King's.

Q. Carl King? A. Yes.

Q. What road is that? A. Martin Mill Pike.

Q. Martin Mill Pike. And how far is that from where you were living? A. Just a little ways from Cook Drive. You get off Cook Drive and go down Joe Lewis Road and go across the street, and that was the store.

Q. Is this a mile, a half a mile, or what in your opinion? A. It's less than a mile. Not even a half a mile.

Q. When you came back out of there, you started up what road? A. I got across Martin Mill Pike and started....

* * * * * * *

Bench Conference

[88]* * * * * * *

The Court: This addresses itself to the discretion of the Court. I'll pass on it should it become....

Gen. Evans: Come down, Sharon.

Witness excused

THEREUPON, THE JURY WAS EXCUSED FROM THE COURTROOM, AND A RECESS WAS HAD, AFTER WHICH THE FURTHER FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

The Court: Gentlemen, before we proceed with the next witness, just as I went out, Mr. Workman stated to the Court

that he would like to reserve the right to call the prosecutrix for further cross-examination. In that connection, Mr. Workman, I wanted to ask you whether or not you did understand the Court's ruling with respect to the objection made to the questions pertaining to what the prosecutrix told you during...

Mr. Workman: As I understand, I can't ask her any questions about it.

The Court: At the same time, the ruling [89] that you could not ask her what she told you during that conversation. I think I made it clear to you then, at least I hope so, that you—I'm not cutting you off from asking her about her other experiences with these two young men that she's mentioned or anyone else that you can specifically name. In other words, I didn't want to cut you off from that, and....

Mr. Workman: As I understand it, I just can't ask her about anything she told me, am I correct?

The Court: During that one conversation.

Mr. Workman: I think I understand.

The Court: All right, all right. Very well, are you ready to resume?

Mr. Workman: Yes, Your Honor.

The Court: Very well. Bring the jury back.

* * * * * * *

Testimony Of Terri Tankersley

[112] Q. Do you remember one of the things I told you what we're going to have trouble with was you talking loud enough so everybody could hear you, right? A. Yes, sir.

Q. So talk up just a little. How long have you known the defendant, Terri? A. Since around '69.

Q. '69. And I believe at one time he went with your sister, didn't he? A. Yes, sir.

Q. Dated your sister. How long did he date your sister? A. About three or four months.

Q. Did you ever see him mistreat your sister?

Mr. Workman: Well, Your Honor, I really don't understand the materiality of all this.

Gen. Evans: Well, if you just give him time, I'm sure he'll figure it out.

The Court: Well....

Gen. Evans: Your Honor, if he wants me to explain it to him in front of the jury, I'll be glad to.

Mr. Workman: Your Honor, I don't know where he's trying to lead, but maybe we ought to let the jury step out and find out. I honestly do not [113] know what he's trying to get to.

The Court: Very well, gentlemen. I sustain the objection on the basis that it is leading. You may take your time and develop your case, General.

Q. Tell the jury whether or not you ever witnessed any difficulties between your sister, while she was dating the defendant, and the defendant?

Mr. Workman: Your Honor, I still don't see the materiality of this as to....

Gen. Gill: I would think the defendant's violent nature would be material to this case in the light of what the victim has testified to.

Mr. Workman: Your Honor....

Gen. Gill: I assume they claim that he's not this kind of a person, and we're trying to show that he is. That's the materiality.

Mr. Workman: Your Honor, if I may finish my statement, I don't see any materiality to this case. He's charged in this case with rape and crime against nature.

Gen. Evans: Are you finished now? I will explain, Your Honor. This young lady explained in detail that one of the reasons that she reacted the way she did was because of this advice she received from this young lady. I think it's proper to show **[114]** why this young lady was given the advice she was.

Mr. Workman: Your Honor, I think we're going to get into a long dissertation of the proof of what witnesses said and what they're going to say and maybe we had ought to have the jury step out.

The Court: Very well.

THEREUPON, THE JURY WAS EXCUSED FROM THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

Mr. Workman: Your Honor, at this time, I would move on behalf of the defendant for a mistrial. The basis of that being, the General stated a statement of fact regarding the defendant as a violent man. I don't think that's at all an issue in this case. Further, I would object and move for a mistrial upon the statement of both generals about what they intend or attempt to prove with this witness about her advice as to why this girl did anything. If she saw this man beat up somebody else—if she had seen him beat up somebody else, it might be a reason for her having fear. But certainly, we haven't put any proof on as to what this girl is going to say. At this time, we move for a mistrial. I think all these things are completely prejudicial to our client. There's nothing we can do about it now. The jury has already heard it.

The Court: Very well.

Gen. Evans: Your Honor, the jury hasn't heard anything yet; and if they did hear anything, Your Honor, of course, can instruct them to disregard it if you decide the evidence is not competent. But I'm so sure that you're going to decide the evidence is competent that I'm not too worried about the motion for a mistrial. Now, on two issues, if this is a rape case where a man's violent nature is not involved, it's the first.

Mr. Workman: A man's violent nature is not involved until this man takes the witness stand, Your Honor. His character and reputation is not involved until he takes the witness stand.

Gen. Evans: I'm not talking about character and reputation. His nature, his violent nature, is involved, because force and intimidation and threats are involved in rape. So his nature is involved. Now, the problem I'm having communicating to anybody is that this girl gets in a car with two other people who are apparently friends. There's nothing to indicate to the contrary. And one of the reasons she does—gives for doing a lot of things is because of the advice and counsel she received from this girl. And I believe I have a right to show that **[116]** this girl's advice and counsel was well-founded, that she knew what she was talking about when she said you better do what he says, you know, and I want to get out of here before he wakes up and kills both of us. Those are elements that planted fear in this girl's mind. I think I have a right to show that this girl knew what she was talking about when she said that. Now, I realize these are not communicated threats in the sense that this girl knew about the beatings of this girl's sister, but I think it's important to show that this girl knew what she was talking about when she said that, because then the emphasis they had with Sharon will be evidence to the jury. When this girl said you had better do it, you better do what he says, it must have been said with some conviction, because this girl knew what this man was capable of when he had been drinking. I think I have a right to show this.

Mr. Workman: Your Honor, if I understand what the Attorney General is saying, he's saying that the State's theory is this, that it is a reasonable fear on this girl's part of this man, because this girl says so. That, Your Honor—if that's their theory, I don't think the case can stand period, because she must have a fear of him. This girl **[117]** telling her something is not (inaudible) by this man that can be held against her just to be a basis for the fear of the crime. He has to do something. He has to excite fear. The statement from this girl, you better do what he says, after all of this is over, after all the rape is over, what she says, I'm going to get out of here before he kills us both, can't be a valid reason for fear in regards to the commission of the rape, because it occurred after everything was over. That had absolutely nothing to do with this case, the reasoning or thoughts of the Attorney General. So what the Attorney General is trying to rely on is this girl may have been afraid of him when he was drinking, so, therefore, we can transfer this to this girl although she knows nothing about all this. She knew absolutely nothing about it, and I think the State will take the position that she knew nothing about all this. But they're relying on one statement essentially to make all this proof, they say, competent, the statement by this girl you better do what he says, and they will attempt to prove his character and reputation for being a violent person or will prove specific incidences. Those—only this girl can testify to, a witness to his reputation. This girl, if she had known he had done these things **[118]** as to a reason for her fear—could have testified about the things she knew, but this girl can't. In other words, they're relying—saying this girl had reason to be afraid of him when he was drinking, and she told her one time you better do what he says sometime before this rape, and that's good enough to get this proof in. That's just too farfetched, Your Honor. And again, we would move for a mistrial on the statements of counsel before the jury.

The Court: Very well, gentlemen. With respect to the last motion—I say last motion. Prior to that, there was an objection to the question and to the elicited answer to be obtained from this young lady about the previous conduct of the defendant, Mr. Lundy. There are two parts to this. First, gentlemen, considering both your objection and your motion for a mistrial here for a moment, there is a distinction between character reputation and the evidence of a prior offense. A witness does not necessarily—that is, the defendant does not have to be a witness for himself or put his character in issue actually before a prior offense can be considered if it has any relevancy upon the issue—upon the matter being tried. There are a number of incidences where prior offenses—I say prior offenses rather [119] than prior crimes, because there is a distinction. There are a number of incidences and circumstances where prior offenses may be properly entered as evidence in the case. Now, for these reasons, the motion for a mistrial is overruled. Now then, with respect to the objection to the question here, if the Attorney General is going into—at this point, the Court does not know what the evidence is going to be. The witness hasn't been asked the questions yet. But if we're going into one of these specific categories or incidences where a prior offense had some relevancy upon the case being tried, then it is admissible. But if it has—if it is not relevant to the case being tried, then it is not admissible. I mean if it is not material or relevant to the case being tried, then it is not admissible. So it is a question then of materiality and relevancy. So may I suggest that you may want to ask these questions in the absence of the jury to find out—so that the Court can pass on whether they're relevant or material or not.

Q. Terri, during the time that Mr. Lundy was going with your sister, did you see him beat her up or abuse her in any way? A. Yes, sir.

[120] Q. How many times? A. About twice.

Q. Had he always been drinking when this took place? A. Yes, sir.

Q. And you were concerned about what he would do when he was drinking, weren't you? A. Yes, sir.

Q. That's why you were concerned that night, wasn't it? A. Yes, sir.

Gen. Evans: That's the proof, Your Honor.

Mr. Workman: Your Honor, I'm not waiving my objection, but just to bring out the full....

The Court: Very well.

Cross-Examination

By Mr. Workman:

Q. When did these beatings occur? A. Sir?

Q. When—how long before this occurrence? A. When he....

Q. Before March—how long before March was it when you were suppose to have seen these things? A. About two years.

Q. About two years before?

[121] Mr. Workman: No further questions.

The Court: All right. Very well, gentlemen. The Court rules that this evidence is too far removed to be material and relevant. The objection to the prior offense testimony is sustained.

Mr. Workman: They will not be allowed to go into this?

The Court: Yes, the Court has ruled that it is not relevant. It is too far removed.

Gen. Evans: Your Honor, I request then that you, also, overrule their motion for a mistrial and instruct the jury to disregard whatever they heard before they left.

The Court: Very well, gentlemen. I have already overruled the motion for a mistrial, and the jury will be brought back and so instructed.

Gen Evans: Thank you, Your Honor.

The Court: All right. Bring the jury back.

THEREUPON, THE JURY RETURNED TO THE COURTROOM, AND AFTER THE CALL OF THE JURY WAS WAIVED BY BOTH PARTIES, THE FURTHER FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

The Court: Ladies and gentlemen of the jury, just prior to the time you were excused from the courtroom, a question was asked by the Attorney [122] General pertaining to whether or not this witness had observed or knew anything about any mistreatment of her sister on some prior occasion or occasions. The Court has sustained the objection by the defendant's counsel to this question as being immaterial and not relevant to the case on trial. You will not consider it for anything. You will not consider the question nor the answer. Put it out of your mind and consider it for nothing. All right. You may continue.

Gen. Evans: Thank you, Your Honor.

Direct Examination (Cont'd)

By Gen. Evans:

Q. Terri, you said you had known Mr. Lundy since 1969? A. Since—it was the last of '68, almost '69, when I met him.

Q. Okay. And how long had you gone with the defendant as his girl friend? A. About two months.

Q. Two months? A. Yes, sir.

Q. Now, on March 16th, 1973, when did you first see Mr. Lundy? A. At the end of February.

* * * * * * *

Testimony Of Miss Sharon Murphy, Jury-Out Hearing

[233] Direct Examination

By Mr. Workman:

Q. Miss Murphy, you are the same Sharon Murphy who testified yesterday in this case? A. Yes, sir.

Q. Did you or did you not tell me when I spoke with you that you had had intercourse with one Aaron Miller ten to twenty times... A. I don't remember if I said exactly that.

Q. Did you tell me you had had intercourse with one Danny Nipper four times? A. I remember telling you I had had intercourse with him, but I don't remember how many times I told you.

[234] Q. Did you tell me that the people you were living with, Roxie Foster and her daughter, did not like boys and did not date them? A. I don't remember saying that.

Q. Did you or did you not tell me as you approached Sims Road the girl told you to take your clothes off, and you asked if you had to do it? A. Mr. Lundy asked me to take my clothes off, and I looked at her and asked if I had to, and she said you better do as he says. He means business.

Q. Did you or did you not tell me that the lights were on when you got in the apartment? A. No, sir, I didn't. They were off when we got in the apartment.

Q. Did you or did you not tell me that after Terri Tankersley brought the water back to you, then you had something to drink? A. I drank some water first, and then he made me drink some whiskey, and I drank some water afterwards, after I drank the whiskey.

Q. But the water was brought to you before you started drinking the whiskey? A. Yes.

Q. Gen. Evans: Your Honor, may I clear up one thing for Sharon that I don't think she really [235] understands. What he's asking is, Sharon, what you told him down at that interview at his office; not what happened, but what you told him down at that interview at that office. That's why he's saying did you or did you not tell me such and such. All you have to do is say, yes, I told you that or no, I didn't tell you that or I don't remember whether I told you that. He's not asking you to go through all the facts again. He's just covering that interview down at his office.

The Court: That is the scope of this examination?

Mr. Workman: Yes, Your Honor.

The Court: All right.

Q. Did you or did you not tell me that when he made you lay down, he gently pushed you back down? A. No, sir.

Q. Did you or did you not tell me he made you put your arms around him? A. I don't remember if I said that.

Q. Did you or did you not tell me that he told you to go in the next room and lay on the table, and you went, and he came in sometime thereafter? A. Yes.

Q. Did you or did you not tell me that he said [236] he was going to keep you two or three days, and you said that was okay? A. Yes.

Q. Did you or did you not tell me that it was two hours from the time Terri Tankersley left and the time you left? A. I don't recall saying two hours. I don't remember exactly what I said.

Mr. Workman: That's all.

Witness excused

Mr. Workman: Now, in regard to the second indictment, the cunnilingus indictment, we would move the Court at this time to direct a verdict of acquittal as to the cunnilingus indictment for the following reasons:

Mr. Kressin: First of all, the only thing that I can see that this defendant can be charged with on this 7518 is that he was aiding and abetting a crime against nature. Now, a crime against nature, if cunnilingus is a crime against nature, then—and that crime is committed, there had to be some intent to commit that crime. Now, we've heard that Sharon Murphy performed that act on Terri Tankersley, so if anyone is guilty of any crime, then it's Sharon and/or Terri. Now, they have both gotten up here and stated they didn't want anything to do with this.

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State's Rebuttal Summation Argument To Jury

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[262] Gen. Evans: Ladies and gentlemen of the jury, I, of course, add to counsel for the defendant and General Gill's thanks for your service and our appreciation really, because I think jury service is the most important service a citizen can make to his country, because I don't believe that jury trials in criminal cases are fundamental to our democracy. It's the last real democracy we have in this country. This is the last forum in which individuals such as yourselves have a chance to literally decide how they want their community run. That's what General Gill addressed himself to. I am always chagrined that we get the last word, because it upsets defense counsel so much. It is one of the few advantages we have in a criminal case. Because we do have to open and we do have the burden of proof, the law allows us the right to get the last say to the jury. I'm sorry it upsets them, but I enjoy it. I won't spend too much time in rebuttal. I agree with many things Mr. Kressin said about giv-

ing fair consideration of the evidence and the presumption of innocence and [263] reasonable doubt and listening to the judge's charge; but about that point, we part company, because he said something about the gravity of the crime; and although I may not have caught the significance of that argument, I can not imagine in my own mind a worse crime being committed, a more personally humiliating crime being committed. Now, granted murder is much more final, but at least the person who is murdered doesn't have to come to court and talk about it, and I can't think of a more grave or upsetting crime than the ones we've heard here for the last two days. Now, if we have so much power and so many resources and so much moral influence, I hope it will be persuasive with you all. I wish we could have used that power, that influence, and that moral pressure on the night of March 16th and the early morning hours of March 17th, and then maybe we wouldn't have had this trial. I wish we could have protected her on that night from what she went through, and I'm glad we've got whatever we've got to bring this case to the people today and get something done about what happened that night and those early morning hours. Now, evidently, the defendant's theory of this case is that we are to believe the minor inconsistencies in the State's proof, and, of course, the State's proof is what we are considering. The only story we've heard about what happened from about 8:15 of the night of March 16th until about four o'clock in the morning of March 17th came from the State's witnesses. And we're suppose to think it's important whether or not he was asleep when we got there, the positions of the clothes [264] when the police got there, whether or not there's a padlock on the door, whether he was covered or not covered, when the clothes were taken off, whether she was or was not held on the bed, whether or not she was forced with his hands or just suggested that she drink whiskey, and whether or not she was really free to go, and whether or not at one time at one point she had her hands somewhere on his back. Now, the most damaging of those inconsistancies is the hands on the back charge by the former girl

friend of this punk and whether she left immediately. Now just for a second when you're back there wondering about that put yourself in Sharon Murphy's position on that bed in that apartment with the only ally of any kind that you had for the last three hours going out the door, because she's going to get out before she gets killed. And it's already established and Terri Tankersley admitted it, that she was scared to death. Every time they moved, he moved. And how long would you lay on that bed until you were darn sure you could get out and not get caught and not wake him up for another round of wonderful frolicking where again I guess we would have to worry about whether his clothes were on or off or the sheet was over him or not and whether there was a padlock on the door. Who cares? It's not important. And the hands on the back did not happen the first time unless I remember wrong. You all are the ones that finally determine. She said one time after she goes into the kitchen—she went into the kitchen after the first act of intercourse—Terri did—and then came back in; and at one time the second or third time of intercourse **[265]** saw hand or hands on the back.

Mr. Workman: Your Honor, I'm going to object. That's not the way I remember it, but it's up the jury which way they remember it.

The Court: Very well. That is correct. The jury will use its own recollection as to what happened or did not happen. All right.

Gen. Evans: Well, you all will remember it one way or the other. I don't think it's important, but remember that the basis of their argument is that you're suppose to believe the inconsistencies and not believe all the consistencies, not believe the threat of the tied socks. They made an issue out of that until we brought the socks in. You're not suppose to believe the statements these girls made right after the crime happened. Now, I like General Gill could not believe the words I was hear-

ing back when we started this case about how important it was to this defendant and how you, and I, and the judge, and everybody else, the court reporter, Mr. Brummitt, the court officer, all are going to forget about this case anywhere from a couple of days to a couple of years I guess, but it was real important to him. Well, I think it's pretty important to her. I don't think she'll ever forget what she went through that night out there. Now, she did one dumb act, and nobody's mentioned it. I'm surprised nobody has. She made the mistake of getting in that car. She should have had more sense. And the first question I asked that young lady when [266] I talked to her was why she got in the car, and she thought they were in the neighborhood, and it was raining, and she wanted to get a ride home. She's about as lazy as I am I guess. It's the stupidest thing she's ever done so far in her life, but it does not excuse what this man did to her from that point on. There is no excuse for that. Now, General Gill has addressed you on the thought of punishment, and evidently, the defendant's counsel agreed that the crime aginst nature is disgusting, vile, horrible and don't even want to talk about it as far as punishment is concerned, so we'll just accept fifteen years for that. We all agree that that is a bad (inaudible), and what he did with regard to a crime against nature is just horrible. They didn't even talk about the punishment for the crime against nature. All they were talking about was rape. I guess everybody agrees we'll take fifteen years for that. Now, with regard to rape, and if you don't believe she was raped, don't spend a lot of time arguing about it; just come back in and say not guilty. If you think she has to have a contract saying I will kill you if you don't cooperate before she has to be fearful, if you think she's got to be beaten to death before she resists enough, if you think all that is required, then don't find this guy guilty of rape. If you don't think she had a reasonable fear, if you don't think she did what she could and got out of there as quick as she could, if you don't think she was raped, turn him loose on the rape case. There seems to be no controversy about the crime against nature. On the other hand, if you think [267]

as I do, and I've never wanted to be on a jury more in a case I've tried, that this is one of the most despicable crimes I have ever heard testimony presented on in six years of being in prosecution, then I ask you in all sincerity for the reasons General Gill enumerated to protect my daughter, your daughters, your grandchildren, your sisters from this guy. Put him away forever. And I don't mean ten years, and I don't mean twenty years, and I don't even mean ninety-nine years. I mean forever. If you agree with me that it is as despicable as I feel it is, I want you to set a term that will let the world know what we think about this kind of crime in Knox County and at the same time will serve the purpose of protecting everybody in this state and in all states of this nation from this man, who thinks he can get a little drunk and do anything he wants to to anybody evidently. Somebody who has no more regard for concept of morality than he's been sleeping with a girl since she was twelve years old, who has no more concept of morality than who would urinate in a girl's mouth when she asks for a glass of water. And I want him away so long we never have to worry about him again, and I sincerely ask you to consider a term of years much higher than has ever been given in the State of Tennessee before. I don't think there's anything unreasonable about a term of years that will make sure he spends the rest of his life in the penitentiary, and that's a term way over the standard fifty or sixty or seventy years for rape.

Mr. Workman: Your Honor, I object to the **[268]** statement the standard fifty or sixty or seventy years for rape.

Gen. Evans: See, we never get the last word in.

Mr. Workman: I object to the Attorney General's comment.

The Court: Very well, ladies and gentlemen. There is no standard. Each case stands in accordance with the charge that is given to you and the evidence that has been presented to you. All right.

Gen. Evans: Of course, when you interrupt, you take the steam out. But I feel sincerely what I've said. And I don't want to tell you what amount of years, but I want to suggest that you seriously consider for both the reasons that General Gill mentioned. Put him away a long, long time. Again, thank you for your patience and consideration in this case.

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Portion Of Trial Court's Charge

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[291] The law presumes the innocence of the defendant, and that presumption stands as a witness for the defendant and maintains until it is overcome by satisfactory evidence of his guilt, and before he can be convicted, his guilt must be established beyond a reasonable doubt. Not a captious, possible or an imaginary doubt, but an honest doubt engendered after an investigation of the entire evidence and an inability after such investigation to let the mind rest easily as to the certainty of guilt.

The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for every witness is presumed to swear the truth. In considering the evidence the jurors ought to look to the intelligence and respectability of the witnesses, their relationship, their interest, their feelings, their apparent fairness or bias, their means of knowledge, the reasonableness of their statements, their appearance and demeanor while testifying, their contradictory statements as to material matters, if any are shown, and all the evidence in the case tending to corroborate or to contradict them.

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Lundy's Brief Filed In The Tennessee Court Of Criminal Appeals

IN THE COURT OF CRIMINAL APPEALS
FOR KNOXVILLE, TENNESSEE

No. 283

State of Tennessee

v.

Noah Lundy

STATEMENT OF THE EVIDENCE

The defendant was sentenced to 120 years in the state penitentiary for rape (believed to be a record in this state) and not less than five and no more than fifteen years for a crime against nature to be served consecutively on the following facts.

The prosecutrix, Sharon K. Murphy, testified that she was 18 on March 16, 1973, and was living with a girl friend and her friend's mother at Apartment 58, Cook Drive, Montgomery Village, Knoxville, TN. (B.E. 20). Miss Murphy testified she had not lived with her parents since she was 17 because she and her mother did not "get along" and she was unemployed and not working. (B.E. 38). At 8:15 PM she went to a store and on her return she was walking on Joe Lewis Road when a car drove up with the defendant and Terri Tankersley, whom she had never met, and asked her if she wanted a ride. (B.E. 21-22).

Miss Murphy directed the defendant to her apartment, but they did not stop and the defendant told her to take her clothes off and told her to do it if "you don't want your brains knocked out" and she removed all her clothing. (B.E. 22, 23). She stated she calmly took her clothes off. (B.E. 24). That while riding, Miss Tankersley blindfolded her with a bra which Miss Murphy

had removed and the defendant "put his hand over in between my legs, and I slapped his hand back," but the defendant did not say anything to her in the car. (B.E. 24). Within ten minutes the car stopped, Miss Murphy put on her shorts and jacket, while still blindfolded with a bra, got out of the car, and walked out to an apartment. (B.E. 62). The defendant never spoke to her until after they were in the apartment. (B.E. 62-63). She asked to have the blindfold removed, which the defendant did. (B.E. 63, 64). The defendant told her to take off her clothes and get in bed, which she did without saying anything. (B.E. 25, 64).

Miss Murphy asked for a drink of water. The defendant had just taken his clothes off, and Miss Tankersley got her the water and the defendant "made" her drink some whiskey. (B.E. 26, 64). Miss Murphy did not attempt to cover herself up because during this entire period the defendant was holding both her hands with his hand. (B.E. 65). But he also held her head back and poured the whiskey down her throat. (B.E. 66). The defendant had not struck her. He told her to lay down on the bed and she began having intercourse with the defendant. (B.E. 67, 26). The defendant immediately began "kissing around" and "feeling" her breasts during intercourse. (B.E. 27). The intercourse did not last "too long" and her arms and legs were both free. (B.E. 27, 68).

Miss Murphy further testifed the defendant went into another room with her and made her perform fellatio on him and did strike her at that time when she pushed him away. (B.E. 29). Then Miss Murphy testified she got back in bed, with the defendant and Miss Tankersley, the defendant told Miss Murphy to perform cunnilingus on Miss Tankersley, which she did. (B.E. 30). Miss Murphy testified that she had intercourse again with the defendant, this time much longer. (B.E. 75, 31). Miss Murphy testified that the defendant did not reach a climax and she did not try to resist him. (B.E. 27, 70).

This Miss Murphy testified after the second intercourse:

> A. I said, well, I know you're tired, and I'm tired. I said, why don't you lay over there and go to sleep. And so he said, well, okay. He was in the middle, and she was by the wall, and I was on the outside of the bed. And so he finally went to sleep; and after he got to sleep...

Miss Murphy testified after the defendant went to sleep Miss Tankersley got up, dressed, tried to get her up, but she told Miss Tankersley to quit and go on. (B.E. 32). It was about two hours after Miss Tankersley left before Miss Murphy left. (B.E. 82). Dr. Herschell King testified he examined Miss Murphy at 2:15 AM on March 17, 1973, found the vagina showed some redness, indicating sexual play or coitus and the vagina seemed to indicate a person "sexually experienced". (B.E. 92). There was no vaginal injury and no spermatozoan was found. (B.E. 92).

Terri Tankersley, 14, testified for the state that she had been the defendant's girl friend for two months prior to March. (B.E. 122). Miss Tankersley testifed that after picking up Miss Murphy they drove behind U. T. Hospital, stopped the car, and then the defendant told Miss Murphy to take her clothes off. (B.E. 126). The defendant never grabbed Miss Murphy or threatened to knock her brains out. (B.E. 137 or 140). Miss Tankersley testified she told Miss Murphy no one was going to hurt her. (B.E. 141).

Miss Tankersley testified that the apartment door was not locked, did not have a lock, but only a bread and butter knife to hold it shut. (B.E. 128, 141). At one time during intercourse Miss Tankersley saw Miss Murphy's hands on the defendant's back. (B.E. 143). Miss Tankersley worked for 30 minutes trying to get Miss Murphy to leave the bed and Miss Murphy had no physical restraint on her so she could have physically gotten out if she had wanted to. (B.E. 147). Miss Tankersley left the apartment about midnight, met some friends, went riding around

and got back to her house at 5:30 AM the next morning. (B.E. 148, 149). She never heard the defendant threaten Miss Murphy during the entire evening. (B.E. 149). Sharon Murphy never screamed, tried to fight or physically resist in any manner. (B.E. 150).

Detective Robert Chadwell of the Knoxville Police Department testified he was the investigating officer who went to the apartment with the prosecutrix at 5th and Gill Streets. (B.E. 170-172). Detective Chadwell took a statement from the defendant at police headquarters, exhibit 2, that morning. (B.E. 176). Detective Chadwell testified as to what Miss Murphy told him the next morning. (B.E. 208-210). Detective Chadwell testified Miss Murphy told him that the defendant did not grab her at all in the car and the only threat was in regard to her getting in the middle. (B.E. 214, 215). Miss Murphy did not tell Detective Chadwell that her arms or hands were in any way restrained during the first intercourse. (B.E. 216).

The defense offered no proof.

ASSIGNMENTS OF ERROR

I

THAT THE EVIDENCE PREPONDERATES AGAINST THE VERDICT AND IN FAVOR OF INNOCENCE.

II

THAT THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE PROOF AS TO THE CHARGE OF RAPE.

III

THAT THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO QUASH AND/OR DEFENDANT'S MOTION FOR DIRECTED VERDICT OF NOT GUILTY FOR EITHER INDICTMENT 7517 OR 7518 IN THAT THE PROOF ESTABLISHED THERE WAS ONLY ONE COMMON INTENT.

IV

THE COURT ERRED IN REFUSING TO CHARGE THE JURY AS SPECIALLY REQUESTED BY DEFENDANT AS TO THE STATE'S ATTESTING FOR THE CREDIBILITY OF THE WITNESSES IT CALLS.

V

THE COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS TO THE STATE'S QUESTIONS ATTEMPTING TO IMPEACH TERRI TANKERSLEY.

VI

THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER THE OBJECTION OF THE DEFENDANT, A WRITTEN STATEMENT AS A WRITTEN "CONFESSION" BY DEFENDANT.

VII

THE COURT ERRED INTO EVIDENCE AND ALLOWING A WITNESS TO READ A WRITTEN STATEMENT OF THE PROSECUTRIX.

VIII

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A MISTRIAL AND ALLOWING THE STATE TO INTRODUCE AN ORAL READING OF A WRITTEN STATEMENT OF TERRI TANKERSLEY PREVIOUSLY HELD INADMISSIBLE.

IX

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A MISTRIAL FOLLOWING THE STATE'S INTRODUCTION OF TESTIMONY BY TERRI TANKERSLEY AS TO REMOTE, INADMISSIBLE, AND PREJUDICIAL PRIOR BAD ACTS BY THE DEFENDANT.

X

THE COURT ERRED IN CONVICTING THE DEFENDANT OF A CRIME AGAINST NATURE ON THE THEORY OF AIDING AND ABETTING.

XI

THE COURT ERRED IN LIMITING DEFENDANT'S CROSS-EXAMINATION AS TO PRIOR STATEMENTS MADE BY HER IN VIOLATION OF THE DEFENDANT'S RIGHTS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION.

XII

THE CONVICTION OF THE DEFENDANT ON THE CHARGED ACT OF CUNNILINGUS IS VOID AND INVALID BECAUSE SAID ACT IS NOT PROHIBITED AS A CRIME AGAINST NATURE IN T.C.A. §39-707.

XIII

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL OR A NEW TRIAL IN VIEW OF THE PREJUDICIAL CONDUCT OF THE ASSISTANT ATTORNEYS GENERAL IN THAT SUCH CONDUCT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL AS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION.

BRIEF OF LAW

I & II

THAT THE EVIDENCE PREPONDERATES AGAINST THE VERDICT AND IN FAVOR OF INNOCENCE.

THAT THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE PROOF AS TO THE CHARGE OF RAPE.

Carroll v. *State,* 212 Tenn. 464, 370 SW2d 523 (1963)

Jamison v. *State,* 220 Tenn. 280, 416 SW2d 768.

King v. *State,* 210 Tenn. 150, 357 SW2d 42 (1962).

Morelock v. *State,* _____Tenn. Cr. App. _____, 460 SW2d 861.

Pryor v. *State,* 217 Tenn. 695, 400 SW2d 700.

Taylor v. *State,* 455 SW2d 168

T.C.A. 39-3701

T.C.A. 40-2529

III

THAT THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO QUASH AND/OR DEFENDANT'S MOTION FOR DIRECTED VERDICT OF NOT GUILTY FOR EITHER INDICTMENT 7517 OR 7518 IN THAT THE PROOF ESTABLISHED THERE WAS ONLY ONE COMMON INTENT.

Carr v. *State,* _____Tenn. Cr. App._____, 455 SW2d 619 (1970).

Hayes v. *State,* _____Tenn. Cr. App._____, 470 SW2d 950 (1971).

Rockett v. *State,*_____Tenn. Cr. App._____, 475 SW2d 561 (1971).

IV

THE COURT ERRED IN REFUSING TO CHARGE THE JURY AS SPECIALLY REQUESTED BY DEFENDANT AS TO THE STATE'S ATTESTING FOR THE CREDIBILITY OF THE WITNESSES IT CALLS.

Cooper v. *State,* 123 Tenn. 37, 138 SW 826 (1909).

State v. *Silva,* _____Tenn._____, 477 SW2d 517 (1972).

Wiley v. *State,* 64 Tenn. 662, 5 Baxt. 662 (1875).

V

THE COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS TO THE STATE'S QUESTIONS ATTEMPTING TO IMPEACH TERRI TANKERSLEY.

State v. *Silva,* _____Tenn._____, 477 SW2d 517 (1972).

VI

THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER THE OBJECTION OF THE DEFENDANT, A WRITTEN STATEMENT AS A WRITTEN "CONFESSION" BY DEFENDANT.

Collins v. *State,* 169 Tenn. 393, 88 SW2d 452 (1935).

Monts v. *State,* 218 Tenn. 31, 400 SW2d 722 (1966).

State v. *Moran,* 215 Tenn. 366, 385 SW2d 912 (1965).

Tines v. *State,* 203 Tenn. 612, 315 SW2d 111 (1958).

VII

THE COURT ERRED IN ADMITTING INTO EVIDENCE AND ALLOWING A WITNESS TO READ A WRITTEN STATEMENT OF THE PROSECUTRIX.

Carroll v. *State,* 212 Tenn. 464, 370 SW2d 523 (1963)

VIII

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A MISTRIAL AND ALLOWING THE STATE TO INTRODUCE AN ORAL READING OF A WRITTEN STATEMENT OF TERRI TANKERSLEY PREVIOUSLY HELD INADMISSIBLE.

Lyles v. *State,* 146 Tenn. 70, 239 SW 446 (1921)

IX

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A MISTRIAL FOLLOWING THE STATE'S INTRODUCTION OF TESTIMONY BY TERRI TANKERSLEY AS TO REMOBE, [SIC] INADMISSIBLE, AND PREJUDICIAL PRIOR BAD ACTS BY THE DEFENDANT.

Gray v. *State,* 191 Tenn. 526, 235 SW2d 20 (1950).

X

THE COURT ERRED IN CONVICTING THE DEFENDANT OF A CRIME AGAINST NATURE ON THE THEORY OF AIDING AND ABETTING.

Flippen v. *State,* 211 Tenn. 507, 365 SW2d 895 (1963).

State v. *Locke,* _____Tenn. App._____, 501 SW2d 826 (1973).

Stephens v. *State,* _____*Tenn. Cr. App.*_____, *489* SW2d 542 (1972).

XI

THE COURT ERRED IN LIMITING DEFENDANT'S CROSS-EXAMINATION AS TO PRIOR STATEMENTS MADE BY HER IN VIOLATION OF THE DEFENDANT'S RIGHTS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION.

Chapman v. *California,* 386 U.S. 18, 87 S. Ct. 824 (1967).

Davis v. *State,* 186 Tenn. 545, 212 SW2d 374 (1948).

Harris v. *New York,* 401 U.S. 222, 91 S. Ct. 643 (1971).

Huffman v. *State,* Tenn. Cr. App., 548 SW2d 29 (1970).

Miranda v. *Arizona,* (citations omitted).

Pointer v. *Texas,* 380 U. S. 400, 85 S. Ct. 1065 13 L. Ed. 2d 923 (1965).

XII

THE CONVICTION OF THE DEFENDANT ON THE CHARGED ACT OF CUNNILINGUS IS VOID AND INVALID BECAUSE SAID ACT IS NOT PROHIBITED AS A CRIME AGAINST NATURE IN T.C.A. §39-707.

Fisher v. *State,* 197 Tenn. 594, 277 SW2d 340 (1954).

Garrad v. *State,* 194 Wis. 391, 216 N.W. 498 (1927).

Riley v. *Garrad,* 219 Ga. 345, 133 S.E. 2d 369 ( ).

Sherrill v. *State,* 204 Tenn. 427 SW2d 811 (1959).

Stephens v. *State,* _____Tenn._____, 489 SW2d 542 (1973).

XIII

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL OR A NEW TRIAL IN VIEW OF THE PREJUDICIAL CONDUCT OF THE ASSISTANT ATTORNEYS GENERAL IN THAT SUCH CONDUCT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL AS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION.

Dupree v. *State,* 219 Tenn. 492, 410 SW2d 898 (1967).

Marable v. *State,* 203 Tenn. 440, 313 SW2d 451 (1958).

Watkins v. *State,* 140 Tenn. 1, 203 SW 344 (1917).

23A C.J.S. §1081, pages 85-87.

* * * * * * * *

(Pages 1-26 of original brief omitted in printing)

IX

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A MISTRIAL FOLLOWING THE STATE'S INTRODUCTION OF TESTIMONY BY TERRI TANKERSLEY AS TO REMOTE, INADMISSIBLE AND PREJUDICIAL PRIOR BAD ACTS BY THE DEFENDANT.

This Assignment of Error arises as a result of the state's attempting to put into evidence wholly inadmissible and prejudicial testimony by witness, Terri Tankersley, as to what she had seen between the defendant and her sister approximately two years prior to the incident in question, (B. E. 120).

The Attorney General asked Miss Tankersley if she had ever seen the defendant strike her sister. The defendant objected as to materiality. Defense counsel asked that the jury be excused so that the court and defense counsel could hear the proof the state intended to introduce. (B.E. 112). The court sustained the objection to the question as leading and allowed the Attorney General to proceed. (B.E. 113). Defense counsel then reiterated for objections as to materiality and the following statements occurred in front of the jury:

> Gen. Gill: I assume they claim that he's not this kind of a person, and we're trying to show that he is. That's the materiality.
>
> . . .
>
> Gen. Evans: Are you finished now? I will explain, Your Honor. This young lady explained in detail that one of the reasons that she reacted the way she did was because of this advice she received from this young lady. I think it's proper to show why this young lady was given the advice she was.

> Mr. Workman: Your Honor, I think we're going to get into a long dissertation of the proof of what witnesses said and what they're going to say and maybe we had ought to have the jury step out.
> (B.E. 113, 114)

Defense counsel then moved the court for a mistrial of statements of the Attorney General and the attempted offer of proof. (B.E. 114). The court then asked the state to offer the proof out of the presence of the jury and Terri Tankersley testified that twice she had seen altercation between the defendant and her sister and on cross-examination she stated that these occurrences were approximately two years prior to the date of this case. (B.E. 119-120). The court overruled the motion for a mistrial and told the jury to disregard any question as to mistreatment of the witness' sister by the defendant. (B.E. 121, 122).

In *Gray* v. *State,* 191 Tenn. 526, 235 SW2d 20, the Supreme Court in detail discussed attempted offers of evidence, such as that involved in this case and the prejudicial nature thereof. As stated in that case, the character and reputation of the accused is not an issue unless the defendant offers proof as to his good character and there is a presumption of good character unless defendant puts it at issue.

In *Gray* v. *State, supra,* the state attempted to introduce statements that the defendant had beat his wife some two years prior to the occasion of that crime and the court stated:

> ...the manner in which it was handled was done clearly to the prejudice of the plaintiff in error...facts and circumstances which were not at issue in the instant law suit and did not bear in any way upon the guilt or innocence of the plaintiff in error. The introduction...through this method was clearly prejudicial to the plaintiff in error. (235 SW2d 20, 22)

The trial court in the Gray case, *Supra,* had sustained the defendant's objections, but the appellate court reversed as a result of the prejudicial attempt of the Attorney General.

Certainly, the indication of the question asked by the Attorney General and combined with comments in front of the jury even with the instructions of the court, left with the jury a bad impression as to defendant's character. Had the proof referred to been in any way material to the issue in the lawsuit, or perhaps even closer in time to the date of the alleged rape, it might be a harmless overstepping by the Attorney General. But, in light of the remoteness of the proof and its complete inadmissibility, the attempt by the Attorney General to offer it and then by comments in front of the jury make this situation a prejudicial error necessitating reversal.

* * * * * * *

(Pages 31-43 omitted in printing)

XIII

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL OR A NEW TRIAL IN VIEW OF THE PREJUDICIAL CONDUCT OF THE ASSISTANT ATTORNEYS GENERAL IN THAT SUCH CONDUCT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL AS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION.

During the trial, counsel for the State made remarks which reflected on defense counsel's integrity before the jury. This continual behavior had the effect of prejudicing the defendant in the eyes of the jury and thus denying him a fair trial secured to him by the United States Constitution by the Sixth Amendment and the Tennessee Constitution by Article 1, Section 9.

The duties of a prosecuting attorney are on a higher scale than merely trying to secure a conviction.

> The prosecuting attorney must conduct the trial in accordance with the rules of law,..., particularly where accused is defended as a poor person. He should not ... say or do anything which might improperly affect or influence the jury ... He should not ... make remarks or insinuations calculated to impress the jury against accused; interrupt accused's counsel in such a manner as unduly to influence the jury; ... 23A C.J.S. §1081, pages 85-87.

With this brief statement as to some of the duties and responsibilities of the attorneys general, it becomes apparent from looking at the record as a whole that there was a certain amount of misconduct engaged in by the State's counsel. For example the effect on the jury from General Evan's remark concerning the manner in which Mr. Workman conducted his interview of the prosecutrix. (B.E. 43-45). It was made to appear that Mr. Workman was a sly individual who had a habit of inviting unsuspecting witnesses to his office to coerce contradictory statements from them. The jury was never told that the attorney general had no right to be present when a defense attorney was conducting an interview with the witness.

Tennessee Courts have considered this problem many times. The question of the attorney general's remarks in closing were considered in *Watkins* v. *State,* 140 Tenn. 1, 203 S.W. 344 (1917). In this case the Tennessee Supreme Court reversed a conviction where the district attorney general made disparaging remarks about defense counsel's taking exception to the attorney general's remarks in closing. The Court said, after reviewing the district attorney general's argument:

> The state does not require or expect of its prosecuting officer that he turn upon an accused, shake his finger in the face of the latter, and address him in abusive and denun-

> ciating terms. By the law of the state one on trial has extended to him the presumption of innocence, during the entire trial up to the verdict, and of this the prosecuting official should not be unmindful. *Watkins* v. *State, supra* at 346.

Similar language as that used in *Watkins* may be found in the closing argument of counsel for the state. (B.E. 265-267). Further statements of how an interview was conducted by Mr. Workman led one to believe that a certain amount of dishonesty was involved. To this type of remark the Court made this statement:

> Imputation of dishonesty to adversary counsel in remarks addressed to (counsel) by the district attorney touching their conduct of the defense was an impropriety so gross that it must now appear to be such to the official who gave the words utterance. A stern rebuke at the time should have come promptly and voluntarily from the presiding judge... *Watkins* v. *State supra* at page 346.

In another case, *Marable* v. *State,* 203 Tenn. 440, 313 S.W. 2d 451 (1958), the conduct of the district attorney general was considered. There apparently was bantering back and forth between counsel for both parties. The Court decided that even though the argument was highly improper, there was no prejudice shown to the defendant. The test for this apparently is this:

> We must look at it here as a jury of fair and honorable men and women who will have heard the evidence and who will take the charge of the Court as the law of the case. *Marable* v. *State, supra* at page 460.

In the case presently before this Court, the behavior that was imputed to Mr. Workman by not having the member of the attorney general's staff present during an interview could be

nothing but prejudicial. The jury not being schooled in law, does not know that the attorney general has no such right.

Assuming that the comments made by the district attorney general were improper, in some cases it has been indicated that prejudice to the defendant must be shown. It would seem that by imposing a sentence that appears to be the longest ever given anyone in this state must show at least some prejudice. Additionally the defendant would direct this honorable court's attention to the case of *Dupree* v. *State,* 219 Tenn. 492, 410 S.W. 2d 890 (1967). The Tennessee Supreme Court reversed the conviction because of intemperate remarks made by the district attorney general. The Court made the following statement:

> This Court has not hesitated to reverse convictions when obtained, wholly or in part, by improper and intemperate argument by the district attorney general. (citations omitted) *Dupree* v. *State, supra* at 892.

Here there can be no doubt that "wholly or part" of this conviction was obtained by these remarks. The Defendant would therefore respectfully ask that this Court reverse and remand this case for new trial.

Submitted this 28th day of January, 1974.

DALE C. WORKMAN
Appointed Counsel

GEOFFREY D. KRESSIN
Appointed Counsel

LUNDY'S BRIEF FILED IN THE TENNESSEE SUPREME COURT

TO THE HONORABLE SUPREME COURT OF THE
STATE OF TENNESSEE AT KNOXVILLE
OR TO ANY OF THE JUSTICES THEREOF

No.

Noah Lundy
Plaintiff-In-Error

vs.

State of Tennessee
Defendant-In-Error

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OF NOAH LUNDY

Plaintiff-in-Error and Petitioner, Noah Lundy, in accordance with §27-821 of Tennessee Code Annotated relies upon pages 1-47 of his brief filed in the Court of Criminal Appeals which is attached hereto.

In reference to Assignments of Error X, XI and XIII, Petitioner feels that the opinion of the Court of Criminal Appeals as to these issues requires further discussion not contained in the brief previously filed.

As to the other Assignments of Error contained in the brief to the Court of Criminal Appeals, the authorities are clearly cited and strongly urge that the Court of Criminal Appeals was in error in its decision. As to the particular issues raised by the Court of Criminal Appeals opinion in regard to: whether the petitioner can be convicted of the indictment charging crime against nature as an aider and abetter when there is no principal involved; as to Petitioner's rights under the Constitution of the United

States of effective assistance of counsel and the right to confrontation; and, the effects of comments of the Attorney General which the Court agrees were improper.

* * *

(Pages 3-5 of original brief omitted in printing)

XIII

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL OR A NEW TRIAL IN VIEW OF THE PREJUDICAL CONDUCT OF THE ASSISTANT ATTORNEY GENERAL IN THAT SUCH CONDUCT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL AS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION.

The Court of Appeals stated "counsel was unduly critical of defense counsel". Page 9. In light of what occurred in this cause and the repeated problems, certainly that is an understatement. As admitted in the reply brief of the State filed in the Court of Criminal Appeals, even the counsel for the State on appeal after reading the record, felt that the statements were not unintentional or rarely made during the course of the trial.

"There was a good bit of acrimony throughout this trial between defense counsel and state's attorney". State of Tennessee reply brief, page 19.

Petitioner would ask the court to review those parts of this record involving statements by Attorney General upon making Motions, attempting to offer proof which was without question inadmissible and particularly following the objection to cross-examination of the prosecutrix and during the final agrument. B. E. 43-45, 265-267, 113, 144.

As stated in the brief filed in the Court of Criminal Appeals, *Watkins* v. *State,* 140 Tenn. 1, 203 SW 344, deals at length with the responsibility of the Attorney General as to his actions and comments during a trial and particularly page 346 of that Opinion the Court admitted it is to the reversible error of comments as to adversary counsel's actions.

As further stated in *Dupree* v. *State,* 219 Tenn. 492, 410 SW2d 890 (1967) the Court stated that the Supreme Court would not be hesitant to reverse on a conviction affected by the intemperate action by the Attorney General.

Considering that the Petitioner receives a sentence of 120 years for rape, the longest single sentence ever given in Knox County, the Court must feel that the actions and comments of the Attorney General got the desired result.

Considering all 13 Assignments of Error in the original brief and those matters herein, Petitioner asserts that this matter in all good conscience and justice should be reversed and remanded for a new trial.

Submitted this 15 day of October, 1974.

DALE C. WORKMAN
Counsel for Plaintiff-In-Error

GEOFFREY KRESSIN
Counsel for Plaintiff-In-Error

OPINION OF THE TENNESSEE COURT OF CRIMINAL APPEALS

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE
KNOXVILLE, APRIL, 1974
No. 283

Knox County

Hon. Richard R. Ford, Judge

(Rape and Crime Against Nature)

Noah Lundy,
Plaintiff-in-Error

v.

State of Tennessee,
Defendant-in-Error

For the Plaintiff-in-Error:

Dale C. Workman and
Geoffrey D. Kressin
Knoxville, Tennessee

For the Defendant-in-Error:

David M. Pack
Attorney General

Bart Durham
Assistant Attorney General

Lance D. Evans and
John W. Gill, Jr.
Assistant District Attorneys General

Opinion Filed: Aug. 30, 1974

AFFIRMED

WILLIAM S. RUSSELL,
Judge

OPINION

The plaintiff-in-error, Noah Lundy, indigent and represented by appointed counsel, appeals his convictions for rape and a crime against nature and consecutive penitentiary sentences of one hundred twenty (120) and five (5) to fifteen (15) years.

The alleged rape victim, Sharon Murphy, was enticed into Lundy's automobile by Lundy's fourteen-year-old female companion, Terri Tankersly, at his direction, on the pretext of giving the victim a ride home. Miss Murphy had walked alone to a neighborhood market to purchase solft [sic] drinks shortly after 8 p.m. It had begun to rain. She entered the car in response to an offer of a ride in the belief that the couple lived in the neighborhood. Lundy did drive her past the apartment where she was living, but refused to stop the car. The victim testified that after passing her home Lundy restrained her by grabbing her arm, subsequently ordered her to change places with the other girl by moving to the center seat position, and as they continued to drive ordered her to remove all of her clothing. The victim asked Terri Tankersly if she had to, and was given an affirmative answer. Lundy told the victim that he would knock her brains out if she didn't undress. Scared and crying, Miss Murphy completely disrobed. Lundy put his hand between her legs, she slapped it and he removed it. At Lundy's direction Terri Tankersly blindfolded the victim with Miss Murphy's bra.

When the three arrived at Lundy's apartment the victim was allowed to put back on her shorts and jacket and was led inside. Terri Tankersly brought the balance of her clothing. Once inside the apartment Lundy ordered to her to completely disrobe again, and to get upon the bed. Her blindfold was removed at her request. He also undressed. The victim asked for a drink of water, which the other girl got for her. Lundy made her drink some whiskey from a bottle from which he was imbibing. He then ordered Miss Murphy to lie on the bed. She testified that he took her hands and held them up over her head as he commenced intercourse.

Miss Murphy at no time fought, screamed, ran or in any way resisted the intercourse. No weapon was ever used or displayed by Lundy. Miss Murphy was conerned that they would hurt, or kill her; and begged them not to. It seems fair to say that the victim was more apprehensive about possibly being hurt or killed than she was about being sexaully violated, as she was passively submissive. It cannot be denied, however, that she was totally within the power of her captors, and her obedience to submission orders must be weighed in that context.

After the first act of intercourse, which apparently did not result in a sexual climax for Lundy, he ordered Terri Tankersly to put a cloth on the kitchen table. He then ordered the victim to go to the kitchen and lie upon her back upon the table, with her head hanging over the edge. He threatened to knock her brains out if she didn't comply. When thus positioned, he ordered Miss Murphy to open her mouth, and "he stuck his penis down my throat". She gagged and pushed him away, at which time he viciously struck her with his fist upon the cheek, the mouth and the forehead. The victim commenced crying again. He made her lie back down again, and inserted his penis down her throat and moved it in and out, and she started to vomit and pushed him away again. He struck her with his fist upon the abdomen and upon the right side. She got off the table, crying, and asked for a drink of water. His response was to make her get down on her knees and he urinated in her mouth, making her swallow most of the urine.

Lundy then ordered the victim back into the bed, already occupied by the disrobed Terri Tankersly. He first ordered Miss Murphy to insert her finger into the other girl's vagina and manipulate it, despite Terri Tankersly's begging him not to. After this was done he ordered Miss Murphy to suck the other girl's vagina. When compliance did not suit Lundy, he struck Miss Murphy twice upon the back of her head with his fist. She then performed the cunnilingus for about two minutes before

becoming sick. He then allowed her to stop. Terri Tankersly testified that while Miss Murphy was performing cunnilingus upon her that Lundy was "trying to have relationship with her in her rear end".

Finally, Lundy had normal intercourse with the victim again, for more than thirty minutes, without ever reaching a climax. He discussed tying Miss Murphy to the bed and keeping her for two or three days, and even had the other girl to tie some socks together to use for bindings. However, at the victim's suggestion, he went to sleep. Significantly, Terri Tankersly, the fourteen year old companion of Lundy and with whom he had admittedly been having sexual intercouse for years, fled the apartment as soon as Lundy was asleep. She tried to get Miss Murphy to go with her, expressing the fear that he was going to kill both of them; but the victim was afraid to leave at that time for fear of awakening Lundy, who had an arm and leg across her. Some two hours later, when he turned over, she fled the premises, hailed a passing taxi, and immediately reported having been kidnapped and raped.

All of this obscene detail has been necessary to this opinion because of the serious question raised as to whether the intercourse was forcible rape. No weapon was ever exhibited, and no resistance was offered. Both sides rely upon the case of *King* v. *State,* 210 Tenn.150, 357 S.W.2d 42 (1962). Unquestionably the act to constitute rape must be forcibly done and against the will of the female. Force means power, compulsion or strength directed toward an end. And against her will means against or without her consent express or implied. *King* v. *State, supra.* Whether force was used is a jury question. In this case, apparently no significant force was directly employed in conjunction with the acts of normal intercourse. The victim was told to submit and she did. But, in context, it cannot be said that she consented, nor can Lundy seriously contend that she did. At all times she was a captive, in justified fear for her very life. Admit-

tedly having had some prior sexual experience, she chose to submit to avoid injury or even death. Consent obtained by force or fear due to threats of force is void and the offense rape. *1 Wharton's Criminal Law and Procedure* 649, §311. Her tacit consent by non-resistance has been found by the jury to be no consent under the circumstances. She did not consent to being kidnapped and imprisoned; and it was in that context that she was raped. It would be an unreasonable misapplication of the law to require as a matter of law that a captured female be required to incur a beating before it could be said that demanded intercourse with her was rape. The force and restraints inherent in the situation supply the forcible character to the act. We hold in response to the first two assignments of error, that the convicting evidence on the charge of rape is legally sufficient to support the conviction and that it was not error for the trial judge to refuse to direct a not guilty verdict. A jury question was certainly presented by the proof.

The cunnilingus which Lundy forced the two girls to engage in is the basis for his crime against nature conviction. It is assigned as error that both convictions cannot stand because "there was only one common intent". It is clear under these facts that different evidence is required to establish the two different acts, and that a different and separate intent was reflected. The assignment is overruled. See *Ward* v. *State*, Tenn.Crim.App., 486 S.W.2d 292; *Harris* v. *State*, 206 Tenn.276, 332 S.W.2d 675; and *Rockett* v. *State*, Tenn.Crim.App.475 S.W.2d 561. Error is assigned upon the trial court's refusal to charge a certain "special request". It was defense counsel's theory that the State could not impeach any of the testimony of Terri Tankersly, whom they had called as a prosecution witness, and a note was passed to the trial judge, in response to his invitation for special requests, asking him to charge the law relative to the State's attesting to the credibility of the witnesses it calls. No specific language was tendered; so, in legal affect, no special request was made. The note said:

"Defendant Noah Lundy requests the Court to give its standard and normal charge that one party to the case calling a witness in its behalf makes that person that side's witness and the legal effect thereof as to the other testimony being binding and the side calling the witness attesting for credibility". The charge as given was correct. If more specificity and enlargement on a given point was desired it was necessary to tender the exact charge requested. The trial judge noted: "Refused. Ambiguous and unclear. The Court's charge was adquate as given". We need not reach the question of sunstantive law sought to be raised, because the "special request" was not in a proper form to raise it. However, no authority is cited for the theory, if it be plaintiff-in-error's theory, that a criminal court judge must charge the jury that the State vouches for the credibility of each and every one of its witnesses, and is bound by their testimony. The assignement is overruled.

A related assignment complains that the State was permitted to ask questions of Terri Tankersly, their witness, which were of an impeaching nature. We do not find that this happened. On redirect examination she was asked questions which amplified her answers upon cross-examination, as was proper.

Error is assigned upon the admission into evidence of Lundy's written statement to officers, voluntarily given after full warnings. The sense of the assignment seems to be that the statement was not a full confession, so was inadmissible as a confession. It was admissible for whatever probative value that it had upon the issue of guilt, and the assignment is overruled.

The next assignment has to do with the victim's report to officers immediately after her escape. She gave them a detailed account of the events, substantially as she testified to them. One of the officers was permitted to testify as to exactly what she reported by referring to the written statement which he took from her. It is well settled that the report of a rape victim, given within a reasonable time after the fact, is competent evidence.

King v. *State, supra.* That the report was reduced to writing adds to the accuracy of the officer's testimony, and certainly does not render the otherwise competent evidence incompetent.

The next assignment of error relates to the statement of Terri Tankersly, also given to officers shortly after the crime. Complaint is made that this statement was incompetent evidence. We find that this evidence was first gone into on cross-examination and thus made competent. The trial judge committed no error.

Error is assigned because of an attempt by the State to prove that Lundy had physically abused Terri Tankersly's sister years before in a totally unrelated occurence. The trial court properly excluded the evidence and instructed the jury to disregard the question. State's counsel made some remarks in the presence of the jury that were overly zealous in support of this incompetent line of proof, and in a different case could constitute prejudicial error. State's counsel alluded to "the defendant's violent nature" as being a matter of fact; and said that the State was trying to show that he was "that kind of a person". However, in the context of the undisputed facts of this case we hold any error to have been harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S.18, 87 S.Ct.824, 17 L.Ed.2d 705(1967); *Huffman* v. *State,* _____Tenn.Crim.App._____, 458 S.W.2d 29 (1970).

The next assignment of error is that the Court erred in convicting the defendant of a crime against nature on the theory of aiding and abetting. Another related assignment is that the conviction on the charged act of cunnilingus is void and invalid because cunnilingus "is not prohibited as a crime against nature in T.C.A.§39-707".

This Court has recently held, in the context of a case of forcible cunnilingus committed by the defendant upon a victim, that the act was a crime against nature as proscribed by T.C.A.§39-707. *Locke* v. *State,* Tenn.Crim.App., 501 S.W.2d 826(1973). Again, in the case sub judice, you have the element

of coercion, this time motivating both of the literal participants. Here, the direct participants were both female. Plaintiff-in-error contends that neither of the females was committing a crime under the circumstances, and reasons that there was no principal criminal whom Lundy could have been guilty of aiding and abetting.

Lundy was not indicted as an aider and abettor. He was charged: "***unlawfully and feloniously did commit a crime against nature in and upon one Sharon K. Murphy; that is to say, that the said Noah Lundy, Alias, did make, force and compel the said Sharon K. Murphy to perform an act of cunnilingus upon the said Terri Tankersly, a female,***".

The evidence certainly supports the factual allegations of the indictment. Lundy was not accused of aiding and abetting, but of forcing the commission of the proscribed act. Whether Sharon K. Murphy is called the victim, or Terri Tankersly, or nobody, is really immaterial. Crimes against nature may be victimless, with both parties as accomplices of one another; or they may involve an innocent person forced to participate, or incapable of consenting. In the case sub judice, both of the females were victimized.

The trial judge did charge the law of principal guilt by being present, aiding and abetting, as set out in T.C.A.§39-109, as follows:

> "39-109. Aiders and bettors deemed principal offenders. — All persons present, aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders, and punished as such."

We also have a statute which provides for the conviction of an aider and abettor whether the principal offender has been convicted or not. T.C.A.§39-110. That statute does, however, presuppose that a principal exists; while in the instant case Lundy is himself the only principal. By forcing others to do an

act which society has proscribed Lundy is himself directly responsible. The force and coercion was his active contribution to the cunnilingus. While the judge's charge dealt with aiding and abetting, and with conspiracy, and did not directly charge the jury that Lundy would be himself criminally chargeable with acts which he forced others to perform, the charge did say" [sic] "If, therefore, you find from the proof beyond a reasonable doubt that this offense has been committed by the defendant in manner and form as charged in the indictment * * * the defendant is guilty of the crime against nature and you should convict him of this offense* * *". In the absence of a special request for further instructions, we do not find reversible error in the charge. While the questions presented by the factual situation in this case are fuel for an academic trip of almost limitless dimensions, and would delight any law professor, we confine ourselves to holding that forced cunnilingus is a crime against nature, and that Lundy was more than an aider and abettor and was convicted under the indictment as the principal offender who forced the criminal act. No other principal is necessary to his conviction.

Error is assigned upon the trial court's ruling that defense counsel could not cross-examine the victim by asking her about specific statements that she supposedly made to defense counsel in a pre-trial interview in defense counsel's office. The predicate for this ruling was the fact that defense counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. The final assignment of error is related to this one, in that it accuses State's counsel of making prejudicial remarks about defense counsel during argument before the jury about the admissibility of these questions.

We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not

believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case.

We have carefully examined all assignments of error. We affirm the convictions.

William S. Russell, Judge

CONCUR:

W. Wayne Oliver, Judge

Robert K. Dwyer, Judge

OPINION OF THE KNOX COUNTY CRIMINAL COURT DENYING LUNDY'S STATE PETITION FOR POST-CONVICTION RELIEF

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE

NO. C412

Noah Lundy

vs.

James H. Rose

OPINION

Lundy contends that his attorneys, Dale Workman and Geoffrey D. Kressin were incompetent of representing him at his trial for rape and crime against nature. The Bill of Exceptions in the *State of Tennessee* v. *Lundy,* case numbers 7517 and 7518 was filed as Exhibit number 1 in the cause and the court spent several hours studying this exhibit.

Lundy's trial attorneys used every legitimate tactic including motions to quash the indictment and an attack upon the constitutionality of TCA Section 39-707. His attorneys interviewed the prosecution's witnesses and other witnesses that testified against Lundy. Lundy committed a heinous crime and the jury fixed his punishment at a total of one hundred and thirty-five years in the State penitentiary. Lundy admitted, while testifying in the cause, that Mr. Workman had worked out a deal with the Attorney General for Lundy to plead guilty to both crimes and serve the minimum term for each crime with the sentences to run concurrently. In effect, Lundy, by his own decision, increased his term of imprisonment by one hundred and twenty-five years. While on the stand he admitted that in all probability

that his attorneys had an incompetent client, and with this the court agrees. His attorneys performed up to the standards set down by our Supreme Court in the case of *Baxter* v. *Rose,* 523 SW 2d 930.

An order shall be drawn dismissing this petition.

This the 3rd day of May, 1976.

Sidney Davis
Judge

LUNDY'S FEDERAL PETITION FOR RELIEF UNDER §2254

FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER 28 U.S.C. §2254

Name Noah Harrison Lundy

Prison Number 72638

Place of Confinement Tennessee State Penitentiary Station A West, Nashville Tennessee.

United States District Court Middle District of Tennessee.

Case No. (To be supplied by Clerk of U. S. District Court)

(Full name) (Include name under which you were convicted) Noah Harrison Lundy, PETITIONER

v.

(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner) MR. VINSON THOMPSON (WARDEN), RESPONDENT

and

THE ATTORNEY GENERAL OF THE STATE OF TENNESSEE, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

INSTRUCTIONS—READ CAREFULLY

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner, and a declaration under penalty of perjury that the information contained herein is true and correct must be signed by the petitioner. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

(2) Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis,* in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis,* you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $_____, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, *the original and two copies must be* mailed to the Clerk of the United States District Court whose address is MIDDLE DISTRICT OF TENNESSEE OFFICE OF CLERK, UNITED STATES DISTRICT COURT NASHVILLE TENNESSEE, 37203.

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack Knox County Criminal Court Division Two Knoxville, Tennessee.

2. Date of judgment of conviction August 24, 1973.

3. Length of sentence (135 Years) Sentencing judge Richard R. Ford.

4. Nature of offense or offenses for which you were convicted: Rape and Crime Against Nature.

5. What was your plea? (Check one)

(a) Not guilty (x)
(b) Guilty ( )
(c) Nolo contendere ( )

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check one)

(a) Jury (x)
(b) Judge only ( )

7. Did you testify at the trial? Yes ( ) No (x)

8. Did you appeal from the judgment of conviction? Yes (x) No ( )

9. If you did appeal, answer the following:

(a) Name of court Court of Criminal Appeals of Tennessee, Knoxville
(b) Result Affirmed Conviction.
(c) Date of result Opinion Filed, Aug. 30, 1974.

If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: Petition for Certiorari was filed with The Supreme Court of Tennessee at Knoxville, September Term 1974 Opinion and Decree was that the petition for certiorari was not well taken, and said petition was denied, March 10, 1975.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes (x) No ( )

11. If your answer to 10 was "yes", give the following information:

(a)(1) Name of court Criminal Court of Knox County, Tennessee Division I

(2) Nature of proceeding Petition for Writ of Habeas Corpus.

(3) Grounds raised Contested the validity of petitioner imprisonment in light of the Constitutional Errors and violations of his Rights as secured to him by the UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION. (Cause No. C-412)

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes (x) No ( )

(5) Result an order was drawn dismissing the Petition.

(6) Date of result May 3rd 1976.

(b) As to any second petition, application or motion give the same information:

(1) Name of court IN THE SUPREME COURT OF TENNESSEE, AT KNOXVILLE.

(2) Nature of proceeding Petition for writ of Mandamus.

(3) Grounds raised That cause No. C-412 Application for Writ of Habeas Corpus had been pending to exceed (90) days and the State of Tennessee had not any Proceeding therein, and ask the Supreme Court to invoke jurisdiction in that matter.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No (x)

(5) Result Writ of Mandamus was Denied.

(6) Date of result December 3rd 1975.

(c) As to any third petition, application or motion, give the same information:

(1) Name of court

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Result

(6) Date of result

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes ( ) No (x)

(2) Second petition, etc. Yes ( ) No (x)

(3) Third petition, etc. Yes ( ) No ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: NO Appeal was taken There after in cause No. c-412 because petitioner did not know how to go about filing an Appeal, and the counsel that had been appointed did not have time to talk to petitioner much less file an Appeal.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: TRIAL COURT: Violated defendants Constitutional Rights by Limiting his Cross-Examination of the Witnesses against him. Supporting FACTS (tell your story *briefly* without citing cases of law): Trial Court ruling that defense counsel could not Cross*-Examine the prosecutrix by asking her about specific statements she made to defense counsel in a pre-trial interview in defense counsel office, the predicate for this ruling was that counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. page 53 of trial transcript states the following: defense counsel Question to the Court. For my own direction Your Honor, what is the authority for such? in other words... THE COURT: The Court has just ruled. defense counsel: For my own direction Your Honor what is there a case on that? THE COURT: THERE IS NOW. TRIAL COURT: RULING VIOLATED DEFENDANTS CONSTITUTIONAL RIGHTS AS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION:

B. Ground two: THE PREJUDICIAL CONDUCT OF THE ASSISTANT ATTORNEYS GENERAL VIOLATED DEFENDANTS UNITED STATES CONSTITUTIONAL RIGHTS: Supporting FACTS (tell your story *briefly* without citing case or law): This assignment aries [sic] as a result of the states attempt ing to put into evidence wholly inadmissible and prejudicial testimony by witness Terri Tankersley as to what she seen between the defendant and her sister, years before in a totally unrelated occurence, the Attorney General ask miss Tankersley if she had ever seen the defendant strike her sister, the defendant objected as to materiality. defense counsel ask that the jury be excused so that the Court and defense counsel could hear the proof the state intended to introduce, the Court sustained the objection to the question as leading and allowed the attorney general to proceed, defense counsel then reiterated for objection as to materiality and the following statements occurred in front of the jury;

GEN. GILL: I Would think the defendants violant nature would be material to this case in light of what the victim has testified to.

MR. WORKMAN: YOUR HONOR....

GEN. GILL: I assume they claim that he's not this kind of a person, and we're trying to show that he is THATS THE MATERIALITY.

MR. WORKMAN: Your HONOR. if I may finish my statement. I don't see any materiality to this case. he's charged in This case with rape and crime against nature.

GEN. EVANS: Are you finished now? I will explain. Your Honor. This young lady explained in detail that one of the reasons that she reacted the way she did was because of this advice she received from this young lady. I think its proper to show why this young lady was given the advice she was.

MR. WORKMAN: Your Honor. I think we're going to get into a long dissertation of the proof of what witness said and what they're going to say and maybe we had ought to have the jury step out; (*Transcript page 113—114)*

Defense Counsel: Then moved the court for a mistrial of statements of the Attorney General and the attempted offer of proof. *B.E. 114.*

The Court then ask the state to offer the proof out of the presence of the jury, and TERRI TANKERSLEY Testified that twice she had seen altercations between the defendant and her sister approximately two years prior to the date of this case. *B. E. 119—120.*

The Court overruled the motion for a mistrial and told the jury to disregard any question as to mistreatment of the witness sister by the defendant.

This petitioner believes as a result of the prejudicial conduct and the attempt of the attorney general to offer this incompetent line of proof. that [sic] his Constitutional Rights to a fair trial as secured to him by the United States Constitution and the Tennessee Constitution. Were Violated.

Certainly, the indication of the question asked by the Attorney General and combined with comments in front of the jury even with the instructions of the court, lift with the jury a bad impression as to the defendants character, had the proof referred to been in any way material to the issue in the lawsuit or perhaps even closer in time to the date of the alleged rape. The attempt of the Attorney General to offer it and then by Comments in front of the jury makes this situation Prejudicial.

C. Ground three: Attorney Generals: Adverse comments relating to Defendants failure to testify. Supporting FACTS (tell your story *briefly* without citing cases or law): Petitioner believes that the comments of the Attorney General were directed at the failure of the defendant to testify in indicating to trial jury that (now) evidently the defendants theory of this case is that we are to believe the minor inconsistencies in the States "PROOF" and of course the states PROOF is what we are considering. The only story we've heard about what happen from 8:15 of the night of March 16th until about four o'clock in the morning of March 17th came from the states Witnesses (Trial Transcript page 263).

The Comments of the Attorney General violated the defendants Fifth and Fourteenth Amendment Rights as secured to him by the United States Constitution and the Tennessee Constitution:

D. Ground four: Trial court judge: Improper charge to trial jury violated defendants United States Constitutional rights Supporting FACTS (tell your story *briefly* without citing cases or law): Charge of trial court: Pages 291—292 of trial transcript reads as follows: (in part)

> The jurors are the exclusive judge of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence you must reconcile them. If you can. Without hastily or rashly concluding that any witness has sworn falsely, (For every witness is presumed to sware [sic] the truth).
>
> You are to draw no inference and you are to place no emphasis whatsoever upon the (fact that the defendant did not testify). As that is his right. The defendant is presumed to be innocent, and that presumption stands in his favor regardless of whether he testifies or not. As the law cast the burden upon the states to prove the defendants guilt beyond a reasonable doubt and this rests upon the state irrispective [sic] of whether or not the defendant testifies.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: C and D grounds of this petition have not been previously presented to any other court (State or Federal) in any petition or motion or application. Because the defendant was not aware that this proscedure [sic] might be a violation of his rights as secured to him by the United States Constitution and the Tennessee Constitution as defendants court appointed counsel had not objected to either coments [sic] of the Attorney General or trial courts instructions to trial jury in the matters set forth in grounds (C and D).

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (x).

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing None

(b) At arraignment and plea Attorneys Dale C. Workman and Attorney Geoffrey Kressin at 4630 Old Kingston Pike Knoxville Tennessee.

(c) At trial Dale C. Workman and Geoffrey Kressin Attorneys 4630 Old Kingston Pike Knoxville Tennessee.

(d) At sentencing Dale C. Workman and Geoffrey Kressin Attorney 4630 Old Kingston Pike Knoxville Tennessee.

(e) On appeal Dale C. Workman and Geoffrey Kressin Attorneys 4630 Old Kingston Pike Knoxville Tennessee.

(f) In any post-conviction proceeding

(g) On appeal from any adverse ruling in a post-conviction proceeding.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes (x) No ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes (x) No ( )

(a) If so, give name and location of court which imposed sentence to be served in the future: United States District Court Eastern Division at Knoxville Tennessee.

(b) And give date and length of sentence to be served in future: June 14th 1971 5 years parole violation

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes (x) No ( )

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on
(Date)
/s/ Noah H. Lundy
(Signature of Petitioner)

Executed at
(City, County, State)

Signature of Attorney
(if any)

Subscribed and sworn to before me this 1st day of Feb. 1979

/s/ Paul K. Trotler
Notary Public

My Commission Expires 11-5-1980

STATE'S ANSWER TO FEDERAL PETITION FOR WRIT OF HABEAS CORPUS

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CIVIL ACTION FILE No. 79-3081-NA-CV

Noah Harrison Lundy,
Petitioner,

v.

Vinson Thompson, Warden,
Tennessee State Penitentiary
and
The Attorney General For
The State of Tennessee,
Respondents.

ANSWER

I

PRELIMINARY STATEMENT

Pursuant to this Court's order entered on February 15, 1979, and summons served upon respondents on February 20, 1979, the respondents submit the following answer.

This is petition for writ of habeas corpus filed by Noah Harrison Lundy complaining of his confinement under a judgment rendered on August 24, 1973, by the Honorable Richard R. Ford, Judge of the Knox County Criminal Court, Division II, approving the petitioner's convictions of rape and crime against nature and sentence to a term of one hundred and twenty years

and not less than five years nor more than fifteen years in the State Penitentiary, said sentences to be served consecutively. Petitioner's conviction was affirmed by the Court of Criminal Appeals of Tennessee at Knoxville on August 30, 1974, and the petition for writ of certiorari filed with the Tennessee Supreme Court was denied on March 10, 1975. The petitioner sought post-conviction relief in the Knox County Criminal Court on December 5, 1975 and the trial court's memorandum opinion was entered on May 3, 1976.

Exhaustion of State Remedies:

The petitioner has exhausted his available state remedies for the allegations stated in grounds 1 and 2 of his complaint. However, the respondents submit that the petitioner is not entitled to relief based upon the allegations stated in grounds 3 and 4 of his petition as a result of his deliberate by-passing of state remedies in order to litigate these issues before a federal court.

The petitioner deliberately declined to seek appellate review of the prosecuting attorney's remarks during closing argument. Significantly, no objection was made concerning the prosecutor's remarks at trial. Furthermore, the petitioner failed to seek appellate review of the trial court's instruction concerning the presumption that each witness is telling the truth when testifying under oath. Likewise, the petitioner made no objection at trial concerning this instruction.

Transcripts:

The Technical Record and Bill of Exceptions of the petitioner's trial and hearing on his petition for post-conviction relief will be provided upon request. Pertinent portions of the transcripts are submitted with the respondents' answer.

Briefs and Opinions:

The respondents file the following briefs and opinions:

a. petitioner's brief in the Tennessee Supreme Court (petitioner's brief filed with the Court of Criminal Appeals is included within the brief filed with the State Supreme Court);

b. opinion of the Court of Criminal Appeals;

c. petition for State post-conviction relief;

d. memorandum opinion and order dismissing the petition for post-conviction relief.

II

ISSUES PRESENTED FOR REVIEW

A

Whether the trial court's refusal to permit petitioner's counsel to examine the prosecutrix at trial concerning prior statements made to the defense counsel during a pre-trial interview so affected the trial that the ruling denied the petitioner his right to due process of law.

B

Whether the prosecuting attorney's remark that the petitioner was a violent person was so prejudicial that the petitioner's State trial was rendered fundamentally unfair and denied him his right to due process of law.

C

Whether the petitioner may seek habeas corpus review of the State's closing argument where no objection was made at trial and the petitioner did not seek appellate review of the prosecutor's remarks.

D

Whether the petitioner may seek habeas corpus relief from his conviction on the ground that the trial judge improperly instructed the jury where no objection was made to the instruction at trial and the petitioner elected not to seek appellate review of the trial court's instruction.

III

ARGUMENT

A

The Petitioner Was Not Denied Due Process Of Law By The Trial Court's Limitations Placed Upon His Cross-Examination Of The Prosecutrix.

During the petitioner's State trial on charges of rape and crime against nature, petitioner's counsel sought to cross-examine the prosecutrix concerning statements made by her to the defense counsel during a private pre-trial interview. The trial court did not permit the cross-examination questions on the grounds that the defense counsel did not properly identify his role to the prosecutrix. This reason for the trial court's ruling was clearly improper and the Court of Criminal Appeals so held. However, the trial judge did permit the petitioner's defense counsel to cross-examine the prosecutrix upon the same subject matter related by her to the defense counsel during the pre-trial interview. The respondents submit that a review of the jury-out hearing wherein the proffered questions and answers were stated on the record, clearly demonstrates that the petitioner was not prejudiced since the defense could not properly lay a foundation for impeachment through prior inconsistent statements. The prosecutrix essentially denied that she made the statements to the defense counsel or, alternatively, could not remember making the said statements (B.E. 232-236).

The Court of Criminal Appeals overruled this assignment of error and stated:

> We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that the defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness.

The respondents submit that the petitioner has failed to demonstrate that the exclusion of this line of examination was a crucial, critical and highly significant factor leading to his conviction. *Anderson* v. *Maggio,* 555 F.2d 447 (5th Cir. 1977). His failure precludes habeas corpus relief. This heavy burden which the petitioner must bear in support of habeas corpus relief reflects the Supreme Court's attitude concerning the granting of habeas corpus relief as stated in *Henderson* v. *Kibbe,* 431 U.S. 145, 97 S.Ct. 1730, 1737, 53 L.Ed.2d 203, 212 (1977) n.13:

> The strong interest in preserving the finality of judgments . . . as well as the interest in orderly trial procedure, must be overcome before collateral relief can be justified. For a collateral attack may be made many years after the conviction when it may be impossible, as a practical result, to conduct a retrial.

This rationale is certainly applicable to the instant case where the petitioner seeks relief from a conviction for an offense occurring over six years ago. Although the trial court's ruling was based upon an erroneous ground, the petitioner's defense counsel should have been aware of the pitfalls by his interviewing the prosecutrix in a private pre-trial setting. *See* ABA Standards, Defense Function § 4.3(d) in Commentary.

B

The Prosecutor's Remarks Did Not Deny The Petitioner His Right To Due Process Of Law.

The petitioner complains of remarks made by the prosecuting attorneys as set forth on pages 113 and 119-120 of the Bill of Exceptions. The respondents point out that the statements by prosecuting attorneys on pages 119-120 of the Bill of Exceptions were made out of the presence of the jury and could not have affected the petitioner's conviction.

The sole remaining remark by the prosecuting attorney made before the jury is as follows:

> Mr. Workman (defense counsel):
>
> Your Honor, I still don't see the materiality of this as to . . . .
>
> Gen. Gill (prosecutor):
>
> I would think the defendant's violent nature would be material to this case in the light of what the victim has testified to. (B.E: 113).

The respondents contend that the concededly improper statement by the prosecutor in the presence of the jury does not present a claim of constitutional magnitude cognizable in federal habeas corpus proceedings unless the petitioner proves that the statement was so prejudicial that his trial was rendered fundamentally unfair within the meaning of the due process clause. *Cf., Alvarez* v. *Estelle,* 531 F.2d 1319 (5th Cir. 1976), *cert. denied,* 429 U.S. 1044, 97 S.Ct. 748. The above quoted remark was isolated and cannot have been said to so affected the fact-finding process that it caused the jury to ignore the evidence and to convict and sentence the petitioner solely on the basis of this singular remark.

C

The Petitioner Was Not Prejudiced By The Prosecutor's Closing Argument.

The petitioner seeks collateral relief from his conviction because of the prosecuting attorney's statements during his closing rebuttal argument. The respondents submit that the petitioner deliberately by-passed his available State remedies by failing to raise this issue on direct review of his conviction and in his State petition for post-conviction relief and, therefore, is precluded from seeking habeas corpus relief. *Fay* v. *Noia,* 372 U.S. 391, 83 S.CT. 822, 9 L.Ed.2d 837 (1963). The petitioner did not object to the prosecutor's remarks at trial and no error was alleged on review of his conviction. Absent a showing of cause and prejudice the petitioner is not entitled to habeas corpus relief. *Francis* v. *Henderson,* 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); *Wainwright* v. *Sykes,* 433 U.S. 72, 97 S.CT. 2497, 53 L.Ed.2d 594 (1977).

A review of the State's rebuttal argument clearly indicates that the prosecutor was not trying to comment on the defendant's failure to testify but merely was pointing out that the State's evidence was uncontradicted by the defendant, which argument is permissible. *Edwards* v. *Patterson,* 249 F.Supp. 311 (D.Colo. 1965); *Heffelfinger* v. *Thompson,* 444 F.Supp. 309 (E.D.Tenn. 1977).

Matters pertaining to the propriety of a prosecutor's argument must be asserted on appeal and do not constitute grounds for habeas corpus relief unless they rise to the level of a denial of the petitioner's constitutional rights. *Keener* v. *Tennessee,* 281 F.Supp. 964 (E.D.Tenn. 1968). The petitioner has simply failed to meet his burden.

D

The Trial Court's Instruction To The Jury Do Not Deprive The Petitioner Of Due Process Of Law.

The petitioner failed to object to the trial court's instruction to the jury concerning the presumption that witnesses are presumed to be telling the truth. No error was assigned on review of his conviction in the State courts and, therefore, the respondents submit that the petitioner is precluded from seeking habeas corpus relief on an issue where the petitioner deliberately by-passed available State remedies. (See discussion of authorities in sub-paragraph C, above.)

The respondents further contend that the petitioner has failed to prove that the instruction, given in accordance with the State law, so misstated the law that the entire trial resulted in a conviction which violated the petitioner's due process of law.

> Before a Federal Court may overturn a conviction resulting from a State trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned", but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.
>
> . . .
>
> The question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *Cupp* v. *Naughten*, 414 U.S. 141, 146-147, 94 S.Ct. 396, 400, 38 L. Ed.2d 368, 373-374 (1973).

The respondents submit that the petitioner has not only failed to prove that the challenged instruction was erroneous, as a matter of law, but more importantly, that the instruction affected the fact-finding process.

IV

CONCLUSION

For these reasons, the respondents respectfully submit that the petition for writ of habeas corpus should be denied and the case dismissed.

Respectfully submitted,

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(Certificate Of Service Deleted)

ORDER AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 79-3081-NA-CV

Noah Harrison Lundy

vs.

Vinson Thompson, Warden, Tennessee State Penitentiary and the Attorney General for the State of Tennessee

ORDER

In accordance with the Memorandum contemporaneously filed, a Writ of Habeas Corpus shall be granted and the defendant discharged from custody unless within ninety (90) days the State of Tennessee initiates steps to try defendant anew.

L. CLURE MORTON

MEMORANDUM

Petitioner Noah Harrison Lundy seeks relief pursuant to 28 U.S.C. § 2254 from a judgment of conviction of rape and crime against nature. He has asserted four grounds for relief:

1. Limiting the cross examination of a witness (prosecutrix).

2. The prejudicial conduct of prosecuting attorney in making certain remarks in front of the jury.

3. That the prosecuting attorney commented on the failure of the defendant to testify.

4. The trial court gave an improper charge to the jury that every witness is presumed to swear the truth.

The petitioner asserts that grounds three and four have not been previously presented to any court, state or federal. The records of the state cause reflect that grounds one and two were presented to the highest court in Tennessee having jurisdiction and decided adversely to petitioner. The records further reveal that grounds three and four were not so presented.

Since grounds three and four have not been presented to the state court there has been no exhaustion of remedies as to these two. Thus this court will not consider them in the constitutional framework. However, in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally.

Prosecutorial misconduct and the deprivation of a meaningful cross examination of one of two eye-witnesses (the prosecutrix) was squarely presented in the court proceedings. The Court of Criminal Appeals of Tennessee responded in the following language:

> Error is assigned upon the trial court's ruling that defense counsel could not cross-examine the victim by asking her about specific statements that she supposedly made to defense counsel in a pre-trial interview in defense counsel's office. The predicate for this ruling was the fact that defense counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. The final assignment of error is related to this one, in that it accuses State's counsel of making prejudicial remarks about defense counsel during argument before the jury about the admissibility of these questions.

> We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case.

To properly address the two grounds asserted by petitioner it is necessary to refer to a substantial amount of testimony. Thus pages 42 through 55 and pages 88 and 113 of the evidence, the argument of the Attorney General to the jury, pages 262 through 268, and the charge of the court on page 291 are made an appendix to this memorandum.

An analysis of the testimony reflects improper conduct of the Attorney General as follows:

(1) On pages 43 and 44 the state's attorney represented to the jury that defense counsel was guilty of illegal and unethical conduct on interviewing the prosecutrix when he knew or should have known that his representation was false.

(2) On page 44 the state's attorney testified to the jury that the prosecutrix was telling the truth. Clearly, this was reprehensible conduct in that the attorney placed his own reputation and the power of the state as vouching for the truthfulness of the testimony of this witness. Neither the attorney nor the State of Tennessee were subject to cross examination. The statement in evidence by General Evans was, "She's telling the truth on the stand . . . ."

(3) The Attorney General stated in the presence of the jury his idea of the proper method for a defense counsel to interview witnesses.

(4) The Attorney General clearly misrepresented the law to the court in connection with the interviewing of the government's witnesses.

(5) The Attorney General represented to the court that the prosecutrix and victim of an alleged criminal event has the right to be represented by counsel and for an attorney general of the State of Tennessee to be present when the witness is interviewed by defense counsel. This is, of course, ridiculous.

(6) The Attorney General represented to the court that because defense counsel interviewed the prosecutrix without an attorney or the state's attorney present, the conduct of defense counsel was inexcusable. This is less than the conduct required of an attorney general charged with the equal treatment of all citizens.

(7) The Attorney General denied an intention to file a grievance with the "Bar Association" because of the aforementioned alleged unethical conduct. The implication that such a grievance would be valid constitutes an effort to browbeat defendant's counsel.

(8) Through the objections of the Attorney General, which had no legal basis, the court was induced to deprive defendant of the right to effectively cross examine the victim, possibly the most important witness against defendant. The objection and ruling were that the witness could not be examined as to previously conflicting statements prefaced by, "Did not you tell me on [a prior] occasion . . . ." As stated by the appellate court in this cause, the ruling was erroneous. An attorney for the State of Tennessee represents that he has sufficient knowledge to properly prosecute cases without infringing the Sixth Amendment rights of defendants. If this prosecutor had such knowledge, it was not evidenced in this cause.

(9) The Attorney General stated in the presence of the jury, "I would think the defendant's violent nature would be material in this case . . . ." Once again the prosecuting attorney placed his personal testimony before the jury. By this statement he indicated to the jury that the State of Tennessee vouched for such a fact.

(10) In the final summation by the Attorney General he used the word "I" innumerable times. He continuously testified and added his personal evaluations to the State's proof. Some examples are:

(a) I cannot imagine in my own mind a worse crime being committed, a more personally humiliating crime being committed.

(b) I can't think of a more grave or upsetting crime than the ones we've ves [sic] heard here for the last two days.

(c) The only story we've heard about what happened from 8:15 on the night of March 16th until about 4:00 in the morning of March 17th *came from the State's witnesses.* (Emphasis supplied)

(d) I don't think it's important, but . . . .

(e) Now, *I, like General Gill, could not believe the words* I was hearing back when we started this case . . . . (emphasis supplied)

(f) Well, I think it's pretty important to her.

(g) I don't think she'll ever forget what she went through that night out there.

(h) . . . and the first question I asked that lady when I talked to her was why she got in the car, and she thought they were in the neighborhood, and it was raining, and she wanted to get a ride home. She's about as lazy as I am, I guess.

The very minimum interpretation of this statement to the jury is that the Attorney General was testifying to a conversation which occurred in his first interview with the prosecutrix in his office. In addition he was giving testimony as to the reason for the action of the prosecutrix in entering the defendant's car, i.e., laziness.

(i) On the other hand, *if you think as I do,* and I've never wanted to be on a jury more in a case *I've tried,* that this is one of the most despicable crime *I have ever heard* testimony presented in six years of being in prosecution . . . . (emphasis supplied)

. . . and I don't mean ten years, and I don't mean twenty years, and I don't even mean ninety-nine years. I mean forever. If you agree with me that it is despicable as I feel it is, I want you to set a term that . . . .

In addition to the lack of opportunity to cross-examine, the foregoing testimony of the Attorney General was prejudicial in that he made a factual comparison of testimony in similar cases based on his personal experience as a representative of the great State of Tennessee.

(j) I don't think there's anything unreasonable about a term of years that will make sure he spends the rest of his life in the penitentiary, and that's a term way over the standard fifty or sixty or seventy years for rape.

In addition to advising the jury of his personal opinion (not subject to cross-examination and a direct violation of ethical standards), the Attorney General represented that there was a standard term of incarceration on conviction for rape of from fifty to seventy years. Any first-year law student would recognize this statement as being a deliberate falsehood. Even though the court instructed the jury there was no standard, the

prosecuting attorney had placed before the jury the thought that some kind of measuring stick did in fact exist.

The above related items were followed by the charge of the court which contained the following:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, *for every witness is presumed to swear the truth.*" (emphasis supplied)

Without determining the legality of the above charge (*See generally,* Cupp v. Naughten, 414 U.S. 141 (1973)), since this question has not been presented to the courts of the State of Tennessee, and assuming as we must that the jurors followed the law as given by the court, the jurors were instructed that they must presume that the testimony given by the victim was true. The jury had no opportunity to determine whether the witness had made a conflicting statement to the defense attorney prior to trial. This when coupled with the personal testimony of the Attorney General, both during the presentation of the State's case and during argument, constitutes a clear violation of defendant's right to a fair trial. Also, subject to the question of exhaustion of state remedies, where there is added to the trial atmosphere the comment of the Attorney General that the only story presented to the jury was by the state's witnesses there is such mixture of violations that one cannot be separated from and considered independently of the others.

Aside from addressing the illegal restriction on defense counsel of the cross examination of a key state witness, the state court addressed the remaining issues in the following language: "We have carefully examined all assignments of error. We affirm the convictions."

This court is aware that there is sufficient evidence, if believed by the jury, to sustain the conviction of the petitioner for this terrible crime. However, that evidence is overwhelming only if the testimony of the prosecutrix (victim) is likewise believed. Under the charge as given, the limitation of cross examination of the victim, and the flagrant prosecutorial misconduct this court is compelled to find that petitioner did not receive a fair trial, his Sixth Amendment rights were violated and the jury poisoned by the prosecutorial misconduct.

See Davis v. *Alaska,* 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed. 2d 347 (1974). *Cf. Donnelly* v. *De Christoforo,* 416 U.S. 637, 644, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). (Prosecutorial impropriety did not amount to denial of fair trial where trial judge "took special pains" to correct any misimpression of jury.) *See generally, United States ex rel. Fournier* v. *Pinto,* 408 F.2d 539 (3rd Cir. 1969).

The Writ shall be granted and the defendant discharged from custody unless within ninety (90) days the State of Tennessee initiates steps to grant defendant a new trial.

L. CLURE MORTON
CHIEF JUDGE

PER CURIAM OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS

No. 79-1280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Noah Harrison Lundy,
Petitioner-Appellee

v.

James Rose, Warden, and the Attorney General of Tennessee,
Respondents-Appellants

ORDER

(Filed June 27, 1980)

Before: CELEBREZZE, ENGEL and MARTIN, Circuit Judges

The respondent appeals from a judgment of the district court granting a writ of habeas corpus discharging Noah Harrison Lundy from custody unless he is retried within ninety days on state charges of rape and crime against nature.

While Lundy's petition stated four grounds for relief, the district judge ruled only on the first two: (1) that Lundy's attorney was prejudicially limited in his cross-examination of the prosecutrix in violation of the petitioner's right of confrontation; and (2) that the prosecuting attorney had violated Lundy's right to due process under the Fourteenth Amendment by improper argument and comment in the presence of the jury. The district judge held that Lundy had not exhausted his state remedies on the remaining claims that the prosecutor had imper-

missibly commented upon the defendant's failure to testify and that the trial court improperly instructed the jury.

The state in its brief asks this circuit to adopt what it characterizes as a rule in two other circuits requiring district courts to dismiss all petitions for writs of habeas corpus where the petitions assert claims which the petitioner has not exhausted in the state court system. *See Galertieri* v. *Wainwright,* 582 F.2d 348 (5th Cir. 1978) and *Gonzales* v. *Stone,* 546 F.2d 807 (9th Cir. 1976).

Such a rule has not found favor in the Sixth Circuit and this court declines to adopt it in the present case.

With respect to the first and second grounds for relief, the court, upon consideration of the entire record, concludes that District Judge L. Clure Morton, in an opinion dated March 21, 1979, properly found, after examining the state court proceedings, that petitioner's constitutional rights had been seriously impaired by the improper limitation of his counsel's cross-examination of the prosecutrix and by the prosecutorial misconduct. The state's argument that any constitutional errors are insulated from review by habeas corpus by the cause and prejudice rule of *Wainwright* v. *Sykes,* 433 U.S. 72 (1977), is without merit, it appearing that in all events the state courts of Tennessee did not apply any Tennessee state contemporaneous objection rule with respect to such claims, but had proceeded to consider the same on the merits. Accordingly,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

John A. Hehman
Clerk

ORDER

(Filed Sept. 4, 1980)

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the respondent-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

John A. Hehman
Clerk